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In The

Supreme Court of the United States

October Term, 1974

No. 74-1442

DONALD M. PETERSON,
Plaintiff-Petitioner,
v.

CASPAR W. WEINBERGER, SEC. OF DEPARTMENT OF H.E.W.; THE UNITED STATES OF AMERICA, THE ATTORNEY GENERAL AND THE FEDERAL DISTRICT ATTORNEY; MRS. MARTHA A. MCSTEEN, JIM ADAMS, CARL GRUNINGER AND DON CHANCELLOR, ALL EMPLOYEES OF H.E.W.; BLUE CROSS/BLUE SHIELD OF TEXAS, GROUP MEDICAL & SURGICAL SERVICE (MEDICARE INTERMEDIARY) AND GROUP HOSPITAL SERVICE, INC. (MEDICAID INSURANCE CARRIER); THE TRAVELERS INSURANCE COMPANY (MEDICARE INTERMEDIARY)
Defendants-Respondent,
v.

JAMES E. PETERSON,
Third Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

On appeal from the United States Court of Appeals for the Fifth Circuit

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To the Honorable Judges of The U.S. Supreme Court:

OPINIONS BELOW

In this case the two opinions of the lower courts were re-

ported, as follows:

Peterson v. Weinberger (Dist. Ct. Tex., 1973) 370 F. Supp. 1259.[1]

Peterson v. Weinberger et al. (CA5, 1975) 508 F. 2d 45.[2]

There is a third reported decision in a companion case, as follows:

U.S. v. Peterson (CA5, 1974) 488 F. 2d 645.[3]

JURISDICTION AND BACKGROUND

The statutory jurisdiction of the Supreme Court is invoked pursuant to 28 USC Sec. 1254(1). The reported opinion of the appellate court, issued and entered on February 14, 1975, includes its entire decision. The appellant, Dr. Peterson, filed two petitions for rehearing. The first petition was denied on March 27, 1975, Exhibit F, and the motion to file the second petition was denied on April 23, 1975.

This case involves many causes of action, each one of which may serve as a basis for Federal jurisdiction. Plaintiff-appellant Dr. Donald M. Peterson seeks three different types of relief, based on four Federal statutes. One of the defendants, the U.S.A., cross-filed with an unrelated cause of action based on the False Claims Act, 31 U.S.C. § 231.

As to plaintiff's case, primarily appellant seeks an injunction against the Department of H.E.W., against conspiring Federal government employees and against three insurance

[1] For a copy of this opinion see in appendix, Exhibit A.
[2] For a copy of this opinion see in appendix, Exhibit B.
[3] For a copy of this opinion see in appendix, Exhibit C.

companies. The injunction would require the Secretary of H.E.W. to comply with a Federal statute, 42 U.S.C. § 1395(g). It would restrain other illegal acts, ending the nonfeasance of persons who refuse to lift sanctions wrongfully imposed and abusing this physician, by requiring compliance with a Federal statute: 5 U.S.C. §§ 551-559 (Administrative Procedures Act). The injunction would order an independent insurance company not to be coerced wrongfully by the Federal government, by a conspiracy which has harrassed appellant for six years by wrongfully interfering with his medical practice.

The second type of relief sought is a judgment with interest thereon, requiring payment of interest on the unpaid medical fees of $90,000 which were wrongfully withheld due to coercion from government employees. Thirdly, plaintiff seeks recovery in tort for the wrongful acts of defendants, who acted in concert to impose wrongfully sanctions on him, and in part such claims are based upon the Federal Tort Claims Act: 28 U.S.C. Sections 921 et seq., including 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412 and 2671 et seq. Fourthly, plaintiff was denied due process of law, with some 28 violations of the Administrative Procedures Act. *supra.*

The government (U.S.A.) was allowed to cross-file, asserting a claim against the Third Party Defendant (James E. Peterson) and the appellant, Dr. Peterson. This claim, asserted for the first time after a delay of more than 3 years from the time when sanctions were first imposed on Dr. Peterson, is based on the authority of a Federal statute: 31 U.S.C. § 231, referred to as the False Claims Act.

Finally, there is a jurisdictional rule of Federal courts that once jurisdiction is obtained over persons, then the entire subject matter in controversy between the parties comes before the court, *Deering Milliken Research Corp. v. Textured Fibres, Inc.* (CA5, 1969) 415 F2d 875; 28 USC § 1441(c); 21 C.J.S. Courts §§ 18, 22, 23, and 25; Moore's Federal Practice, 2d, Vol. 1A, page 621.

Thus, it is clear the Federal courts have jurisdiction over all the controversies herein. The U.S. Supreme Court has the power to review decisions of the lower Federal courts, Constitution, Article III, Sec. 1.

All the Plaintiff's causes of action were arbitrarily dismissed by the trial court, and James E. Peterson, along with the appellant, was fined for violation of the False Claims Act. The lower court was affirmed by the court of appeals. As a losing litigant in the Federal court of appeals, the appellant's proper remedy is a petition to the Supreme Court for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are many, unfortunately, due to numerous errors of the lower courts. The first seven questions relate to the False Claims Act case. The eighth question relates to both cases. The final six questions (9-14) relate to the Plaintiff's case.

FALSE CLAIMS ACT CASE

1. Is the $131,606.72 fine under the False Claims Act imposed on Dr. Peterson, in view of his noninvolvement, an "excessive fine," and therefore invalid under Amendment V of the U.S. Constitution?

2. Is the complex, harsh statutory penal scheme, as enacted by Congress and applied to requests for fee payments under Medicare, such as impose an excessive fine or to deprive appellant-physician of due process, and therefore is invalid and unconstitutional?

3. As the False Claims Act requires a "knowing" and "filing of false claims," and the facts show appellant *knew not* about the filing and he did *not* participate in the filing, is it error to fine him for violation of the statute?

4. Was it error to fine appellant in the instant case, when in its prior decision on the identical facts (the same alleged wrongful acts) the same court absolved appellant from guilt? Did not the court misconstrue the circumstancial facts in the instant case? Was not this second violation merged in and tried as part of the original trial? Or was there some other error based on double jeopardy or estoppel?

5. In view of the conflict among circuits and confusion in court decisions as to what "intent" what "knowing" and what wrongful act constitutes a violation of the F.C.A., should not this statute be clarified by the Court, particulary here, where the guilty appellant was clearly not even a participant in the filing of claims?

6. May a Federal court of appeals simply ignore its own

controlling precedent decision (*U.S. v. Priola*[4]), and here make an inconsistent holding without any reversal or reconciliation whatsoever with the earlier decision? Is this denial of due process, in violation of Amendment V of the U.S. Constitution?

7. As the appellant is in the position of an agent who has in good faith paid his principal the sums received from a third party, is he (agent) not thereby discharged from any liability, or in alternative is his liability not secondary to that of the principal?

F.C.A. CASE AND PLAINTIFF'S CASE

8. Where trial judge cuts off trial without appellant or his designated witnesses being called, though counsel asked that they be allowed to testify, is appellant thereby denied a fair rtial and due process?

PLAINTIFF'S CASE

9. Were not sufficient facts proven here — various wrongful acts in a concerted action of several defendants abusing appellant's medical practice — to establish the elements of a tort, and thus shift the burden to defendants who failed to justify their acts?

10. Where there is a refusal to permit pre-trial discovery (failure to allow inspection of complete governmental agency

[4] *U.S. v. Priola* (CA5, 1960) 272 F. 2d 589, holding an unknowing accused is not liable under the False Claims Act. And for three other decisions of the circuit to the sme effect as *Priola* see: *Henry v. U.S.* (CA5, 1970) 424 F2d 677. *U.S. v. Ridglea State Bank* (CA5, 1966) 357 F2d 495. *U.S. v. Aerodex, Inc.* (CA5, 1973) 469 F2d 1003.

file in a tort case based on wrongful conspiracy to abuse appellant's medical practice), was it error not to impose a proper sanction, as prescribed by Rule 37, Fed. Rules of Civ. Proc.? Are executive departments immune from pretrial discovery in cases brought under Federal Tort Claims Act?

11. May the lower courts simply ignore recent precedents such as *Goldberg v. Kelly, Scheuer v. Rhodes, Bivens v. Six Unknown Fed. Narcotics Agents,*[5] etc. . . ., or in other words are Supreme Court decisions the law of the land, which must be followed by lower Federal courts?

12. Was it error for the lower court to grant immunity to these defendants? Was it error to grant governmental immunity to field investigators here, based on the governmental executive rule of *Barr v. Matteo,*[6] ignoring subsequent Supreme Court decisions contrary to the instant case, such as *Bivens, supra?* Is not the Federal government liable under the Federal Tort Claims Act?

13. Where insurance company defendants are wrongfully induced to default in paying fees due appellant for medical services rendered his patients, is he not entitled to interest on the overdue, unpaid debt?

14. Where the Department of H.E.W. has wrongfully imposed sanctions on appellant for more than six years in viola-

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[5] The cittion of these U.S. Supreme Court cases are as follows: *Goldberg v. Kelly* (1970) 397 US 254. *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 US 388. *Doe v. McMillan* (1973) 412 US 306. *Logue v, U.S,* (1973) 412 US 521. *Scheuer v. Rhodes* (1974) 416 US 232. *Goss v. Lopez* (1975) .... US .... 42 L.Ed. 225. *Wood v. Strickland* (1975) .... US .... 43 L.Ed.2d 214.

[6] *Barr v. Matteo* (1959) 360 US 564.

tion of Federal statutes, such as 42 USC § 1395(g), is he not entitled to injunctive relief?

APPLICABLE STATUTES

As many provisions of the U.S. Constitution and Federal statutes are involved in this case, the text thereof have been included in the appendix as Exhibit D.

For a listing of the applicable provisions see the preface to Exhibits, entitled Schedule of Exhibits.

MATERIAL FACTS

This case began seven years ago in the fall of 1968, when an investigation was started of James E. Peterson, brother of appellant. The two operations investigated were Concord Manor, a nursing home occupied by aged patients, some of whom were Medicare beneficaries, and a physical therapy services operation. The latter was called Greater Irving Home and Health Agency (G.I.H.H.A.). It was an extensive operation which began providing physical therapy services under Medicare on July 1, 1968. The appellant, a physician in Dallas, was never in any way connected with his brother's physical therapy operations after June 30, 1968. These physical therapy operations of James Peterson were headquartered in Irving, Texas. This investigation was an unusual one in that it was conducted jointly by personnel of two organizations: (1) the Bureau of Health Insurance and (2) Group Medical and Surgical Service, a Medicare intermediary.

While this investigation was being conducted a second and smaller physical therapy operation of James E. Peterson in Irv-

ing, called Zodiac, prepared and filed in early April, 1969 some 120 forms, entitled "Request for Medicare Payment." These forms, the heart of the controversy here, were billings for physical therapy services rendered to Medicare patients during the six months, January-June, 1968. These forms were prepared using the Code number of Dr. Peterson (appellant) a physician qualified under Medicare. In addition, the appellant's signature thereon was forged. The appellant did not know in April, 1969 about the submission of these forms, nor of their contents. There was no evidence connecting Dr. Peterson either with the preparation or filing of these forms. For a more detailed discussion of the facts the reader is referred to the very astute analysis made in the opinion of *U.S. v. Peterson, supra,* a companion case, (CA5, 1974) 488 F.2d 645, Exhibit C in the appendix. A careful study of the facts, as made in the first opinion, is essential to a fair adjudication in this case. But an analysis of the circumstances is beyond the scope of this petition, other than to request that the two opinions be compared, *Peterson v. Weinberger, supra.* Exhibit B.

It is significant that in the forms filed by James E. Peterson the office address of Dr. Peterson was *not* used. Instead, as James Peterson desired that the checks be received directly by him, his post office box number in Irving was inserted on the forms, and at least one form was altered to delete the physician's address. But the checks nevertheless were mailed to appellant's office, as his physician Code number (9890) appeared on the form, and automatically the computer followed its instructions, ignoring writing to the contrary on the forms.

The checks ($15,803) were received in late May or early June, and were bunched together, and a single deposit was made by the physician's secretary. It is also significant that included in the deposit were other checks ($2,336) received for medical services rendered by the physician to his patients. Then the physician on June 3, 1969 knowing that the physical therapy services had been rendered by Zodiac, in good faith paid his debt to Zodiac with a check for the entire amount of the deposit, $18,139. Thus, Dr. Peterson carelessly overpaid Zodiac by including $2,336 of his personal funds, which amount incidentally has not been repaid to Dr. Peterson though payment has been demanded. As to Dr. Peterson, there was no intent to defraud.

Dr. Peterson learned of the filing (the wrongful act under F.C.A.) only when Medicare checks were received in his office several weeks after the filing. And even then he learned only of the act of filing. He knew not of the false element in the forms — that his signature was forged.

Dr. Peterson considered the June 3rd check for $18,139 (the amount of the total deposit made by his secretary) as a full discharge of the debt owed his principal. Subsequently in July, and again Dr. Peterson is not responsible for this, Zodiac (the principal) sent him six invoices in the amount of $21,126.70. This was confusing to Dr. Peterson, but as he believed he owed no additional amount, he made no additional payments. The appellate court misconstrued an answer of Dr. Peterson to questions about these invoices, taking the statement "because I did not owe the money" as referring to

the whole amount and not the additional $3,000 amount billed.

Carbon copies of the Medicare forms were retained in the offices of James Peterson. During June, 1969 the field investigators examining G.I.H.H.A. encountered these carbon copies. The scope of their investigation was extended to encompass these forms.

From the conduct of the investigators it became apparent that they had concluded that James Peterson must be terminated as a provider of services under Medicare. The substantial provider of physical therapy services, G.I.H.H.A., was suspended, though no civil or criminal action has been brought for the claims filed by it.

It was also apparent that the investigator desired to prosecute James Peterson, the principal, but concluded they had a weak case. Apparently they decided the prosecution needed an inside witness, and Dr. Peterson was selected for this role. The means for obtaining his cooperation would be the physical therapy forms filed by Zodiac, predecessor of G.I.H.H.A. To pressure Dr. Peterson to cooperate they secretly imposed sanctions on him, suspending the physician from Medicare, the Texas program for Medicaid and the Railroad Retirement program. To do this the field investigators in December, 1969 sent letters to the insurance companies directing them to suspend Dr. Peterson.

The suspension letters, patently on their face deficient, were invalid. But due to economic coercion of the government, naturally but wrongfully, the insurance companies complied

with their directions, though illegal. Dr. Peterson was not told of any of these suspensions, either by the investigators or by the insurance companies. There was no notice to him. There was no hearing. There was no determination. These investigators, took no action whatsoever in connection with Dr. Peterson's rights, though action is required by the Administrative Procedures Act.

Dr. Peterson's suspension, testified the investigators, was predicated on their belief (erroneous) that Dr. Peterson billed for certain physical therapy services, which had already been billed for by and paid to Concord Manor, in the amount of some $22,000. T.537. Such duplicate billing caused a $33 overpayment, and it resulted from an oversight of clerical workers. It was not negligence, for as shown by the Exhibits (Zodiac billing to Dr. Peterson), the office personnel took care not to make duplicate billings, as some patients were covered under Medicare and some were not covered. But more important there, Dr. Peterson was responsible in no way for either billing. Moreover, this testimony hardly seems credible, since the intent here is clear: to impose sanctions. The withholding from Dr. Peterson did not stop at $22,000, or even at $89,000.

Shortly thereafter Dr. Peterson inquired of the Medical Director of Blue Cross/Blue Shield why he was not receiving checks for medical services rendered his patients under Medicare and Medicaid. As a consequence he was reinstated as a physician-provider, and checks withheld by Blue Cross were paid to him. But when the field investigators learned of the

reinstatement, they again ordered sanctions imposed on Dr. Peterson. And again nothing whatsoever was said to Dr. Peterson.

Appellant was confused by the unwarranted harrassment, but he was persistent in his efforts to get reinstated, and he engaged three different lawyers to help. The first and the second lawyer withdrew. The Bureau and intermediary simply refused to make any concrete charges against Dr. Peterson, which could then be refuted. This plan of non-action was successful, lawyers previous to present counsel could get no relief for appellant, and seeing the futility of their engagement they resigned. All the time the financial pressure on the physician was increasing. He continued to treat these patients, to the exclusion of other patients, for he was not advised of any suspension. The sanctions continued, and he could get no information. In June, 1969 a conference was held by the field investigators, but this was not a hearing. Instead, it was merely a giving of *Miranda* warnings. No specific charges were ever made against Dr. Peterson at the conference. No hearing was held. No detemination was made. The acts of the field investigators were illegal.

Many efforts were made by appellant during 1970 and 1971 to collect the unpaid receivables of his medical practice, but he could never find out what was the cause of his harrassment. The investigators, the Bureau in Baltimore and Blue Cross refused to act and refused to communicate with Dr. Peterson's counsel. There was a conspiracy of silence. Among other efforts, the physician arranged for his U.S. Senator to

write a letter to the Department of H.E.W. In a quite appropriate letter, Senator Tower said he did not wish to influence the result, but he did ask that some disposition of the Dr. Peterson case be made promptly. This was not done. Finally, after suffering sanctions for twenty-one months the appellant petitioned for relief in the Federal district court in September, 1971. Thereafter, in October, 1971 finally the Department of H.E.W. acted by then referring its case file on Dr. Peterson to the Department of Justice. At the time his petition was filed in Federal court for relief Dr. Peterson was owed over $70,000. The sanctions were continued until April, 1972 when payments were made under an injunction of the Federal district court, for Justice itself was unwilling to correct the error and order payment made, as it was feared such an act would be construed as an admission of the previous wrongful act.

The appellant has always been cooperative, but he was simply unable to help the investigators, to serve as their witness against James E. Peterson. There was no plea bargain offer ever made by Dr. Peterson because he was unfamiliar with the facts about the business affiairs of his brother after his resignation on June 30, 1968. Nor was Dr. Peterson familiar with the business affiairs of his brother during the first six months of 1968, for his brother is a very secretive type of businessman.

As to Dr. Peterson's non-involvement with the filing of the 120 forms and as to the careless overpayment of $2,300, the government was fully aware of these facts in 1971. Dr. Peter-

son supplied all the evidence he had, and withheld no information from the investigators. There was no good defense for the wrongful acts of defendants in the tort action brought by Dr. Peterson. So the Washington office of Justice concluded their best defense was to launch a strong offensive against Dr. Peterson, though he was known to be the wrong defendant. Therefore, a forceful, vigorous attack was begun, in order to attribute to Dr. Peterson the forms filed by his brother, James Peterson. Thus, the harrassment continued after 1971 under the auspicies of Justice.

Criminal actions were brought. Three different indictments were obtained, each with full coverage by Dallas newspapers. The first indictment (May 2, 1972) was filed only against Dr. Peterson, alleging violation of 18 USC Sec. 1001 (making false statement to government). The second indictment charged violation of the two criminal statutes: 18 USC 286 and 18 USC 287. The third indictment, filed February 2, 1973, alleged offenses under 18 USC Sections 371 and 1001, and James E. Peterson was joined as a defendant. This third indictment was the basis for the decision in *U.S. v. Peterson* (CA5, 1974), which on January 18, 1974 reversed the conspiracy conviction as to Dr. Peterson. As the facts were fully-developed at the trial, so stated the opinion, there was no need for a new trial, for the facts showed positively that Dr. Peterson was not involved in the plan to make false statements. Appendix, page C-11.

The government investigators did not advise the physician's medical profession association of his suspension, though nor-

mally complaints and notice of any such action are sent to the association's Peer Review Committee. Nor was any notice of the sanction sent to the national medical association, though the Medicare coordinator of the association for years has resided in Dallas. On the other hand, concerned about the abuse of its member, the Texas association made two inquiries shortly before Dr. Peterson filed his petition in September, 1971. One inquiry was made by the associaiton's executive secretary to Mrs. McSteen, one of the defendants. Another inquiry was made by the chairman of its Peer Review Committee to the Medicare office - Baltimore. There was no reply whatsoever. Again in this case the bureau employees adhered strictly to their game plan — a conspiracy of silence, a cover-up.

As a normal consequence of having a government bureau who fails to reply in any way, prseumptions were made by many members of the association, and many physicians in Texas simply and normally concluded Dr. Peterson must be guilty of serious misconduct. Many fellow physicians imposed an informal quarantine on Dr. Peterson. The "not guilty" verdict in the first penal case served to dispel in the main the quarantine, though with some physicians doubts remain due to this second penal case. The complete lifting of this cloud on Dr. Peterson's professional career will occur only after the Section 231 charges herein are dismissed.

Then in the instant case, 16 months after the petition was filed, the government counter-attacked in this civil litigation. In January, 1973 it filed a crossclaim, joining James E. Peter-

son as a Third Party Defendant and seeking a recovery on the grounds of filing of false claims (False Claims Act, 31 USC § 231) from the principal (James E. Peterson) and the unknowing agent (Dr. Peterson) as well. Consequently, the instant case includes also a False Claims Act case of the government in addition to the rather complex plaintiff's case involving many classes of defendants and (1) injunctive relief (2) tort, conspiracy and exemplary damages and (3) suit in contract to recover debt and interest. Counsel for appellant found it necessary to waive the right of trial by jury due to the three circumstances: (1) the then outstanding verdict of "guilty" against Dr. Peterson, since reversed, (2) the complexity of the civil litigation, the trial judge refused to sever the two unrelated cases, and (3) the presence of James E. Peterson as co-defendant, which would be prejudicial to Dr. Peterson in any jury trial.

As to appellant's tort case, many frustrating attempts of pretrial discovery were made to inspect the case file. These efforts failed to produce the complete government files, and at a hearing during the trial the government gave no satisfactory explanation. We find appellant's attorney still trying to make pretrial discovery after the trial is almost over! And the short hearing was a farce, as the trial judge cut it off short and interrupted counsel 14 times in about 20 minutes of trial time. The trial court erred in not imposing proper sanctions, as requested.

As to both plaintiff's case and the F.C.A. case, Dr. Peterson was not allowed to call himself on direct examination as

a witness, though his counsel on several occasions asked that he be allowed to testify. In the pre-trial order submitted to the trial court, the estimate of total time was 60 hours, of which 32 was allocated to Plaintiff, 12 to defendants and 16 to Third Party Defendant. The other litigants were allowed additional time at the trial, while the time of appellant was reduced to less than 4 hours. Appellant was allowed to call only 2 witnesses, both of whom were defendants and hostile. Pliantiff's counsel was allowed only to cross-examine Dr. Peterson who had been called by the government as its witness. The trial judge ended the trial with appellant's counsel still trying to place appellant on the stand as a witness.

At the trial of the instant case a government witness (Martha McSteen) testified, despite the wrongful imposition of sanctions here, that there was no plan to grant a hearing or to reinstate Dr. Peterson after the conclusion of this litigation, either under Medicare or Medicaid. Under these circumstances an injunction should be granted to terminate this long-continued abuse of Dr. Peterson. Clearly the acts of defendants are in violation of Federal statutes prescribing (1) payments at least monthly, (2) non-interference with patient's selection of physician and (3) appellant's rights (to a hearing, determination, etc.).

As to plaintiff's case, Dr. Peterson's counsel was advised frankly by the trial judge before trial that he intend that there would be no trial of this action in his courtroom ever. The judge then made a pre-trial dismissal. There was no trial, as counsel for Dr. Peterson was not allowed to call his witnesses.

The appellate court in its opinion stated there was a trial of plaintiff's case before the False Claims Act hearing. A reading of the transcript shows the error of the appellate court, for no evidence was ever received by the trial court. In reality, the trial judge dismissed plaintiff's case without hearing any evidence, as would be done had a valid demurrer been filed, but it was not necessary here for defendants to file any demurrer.

As to the merits of the government's case against James Peterson for his operations under the name, Greater Irving Home and Health Agency, no charges have ever been filed against him. It is apparent the government has been more concerned with continuing its harrassment of Dr. Peterson, as a means of defending against its mistakes.

In June, 1973, before the reversal of Dr. Peterson's conviction by the Fifth Circuit, there was a trial by the Federal district court of the instant case without a jury. There was an arbitrary dismissal of plaintiff's case. The trial court concluded that Dr. Peterson and James E. Peterson were jointly and severally liable for filing false claims and under Section 231, and assessed a liability of $131,606.72. On appeal to the Fifth Circuit, the lower court was sustained in all respects. *Peterson v. Weinberger* (CA5, 1975) 508 F2d 45.

For the filing of one erroneous "Request for Medicare Payment," a physician may be subject to penalities under Federal law in the total amount of $52,000 plus 26 years imprisonment, plus double damages. See Exhibit E.

As a result of the criminal prosecution, Dr. Peterson was

subjected to three indictments, the horror of criminal trial, and the suspense of an appeal before his innocence was proclaimed. In addition, he sustained money losses, as his defense costs of the criminal cases exceeded $30,000.

The appellant's petition for rehearing was denied by the Fifth circuit court of appeals on March 27, 1975, Exhibit F in the Appendix.

SUMMARY OF ARGUMENT

In the first part of this summary appellant's contentions on the False Claims Act case are mentioned point by point. Plaintiff's case is summarized in the latter part.

1. Unconstitutional — Excessive fine.

The excessive fine of $131,606.72 here imposed against appellant violates Amendment VIII of the Constitution, which provision prohibits "excessive fines." The Constitutional rights guaranteed U.S. citizens by the Bill of Rights, Amendment VIII, are important and substantial. This fine imposed under the False Claims Act is contrary to Amendment VIII is invalid, and it is the duty of the Supreme Court to set it aside.

2. Unconstitutional — Complex statutory scheme invalid.

The complex statutory scheme of fine and penalties,* as enacted by Congress, for Medicare forms filed by physicians for medical fees is virtually a cobweb for entrapment, forcing plea bargaining for a lesser offense. As such, the statutes deprive physicians of due process, permit double jeopardy and

*See footnote 7, infra.

impose excessive fines, and thus are contrary to Amendments V and VIII, and therefore are invalid. Thus, the Court should set aside the fine imposed under an invalid statute.

3. No violation of False Claims Act by Dr. Peterson.

The appellant's acts here failed to violate the False Claims Act. The statute requires a "knowing," and appellant first learned of the filing weeks after it occurred. The gravamen of the F.C.A. is simply the "filing of false claims," and a later payment of any money is independent and not a material part of the wrongful act. Appellant did not participate in the filing. Appellant's first and only act here, unconnected with the filing, was the receipt and forwarding of the money.

4. For the same acts, allegedly wrongful, Dr. Peterson was previously adjudged "not guilty." In the instant case he is not guilty as well.

5. As to "intent," "scienter," and "knowing" as elements of the wrongful act under the F.C.A., there is confusion in the decisions, inconsistency in the law and a conflict of circuits, which should be resolved, particularly in the instant case, where the holding is clearly contrary to the wording of the statute (as to "knowing").

6. Here intent was implied to Dr. Peterson, though the same court of appeals in a prior decision in 1960 held that intent may not be imputed, and the court has not overruled that precedent. Stare decisis is here violated.

7. Though the Third Party Defendant (the principal) may be liable under the F.C.A., the appellant (agent) who in good faith paid the money is not.

8. There was no fair trial, as plaintiff was not allowed to call his witnesses.

9. The elements of a tort were proven by appellant, and there should be a hearing granted on the amount of damages, if any.

10. As there was a refusal to permit pre-trial discovery, sanctions should be imposed on the defendants, Rule 37 of F.R.Civ.P.

11. There is liability here under the Federal Tort Claims Act; the lower courts must follow *Bivens*, *infra*, and the other recent cases and the statutes.

12. The defendants here are not immune from liability. None of them.

13. Appellant is entitled to interest on the money withheld from him.

14. To end this wrongful abuse, appellant is entitled to an injunction.

ARGUMENTS

This case involves two entirely different and unrelated controversies a False Claim Act primarily against James E. Peterson and a Plaintiff's case brought by Dr. Peterson for tort damages, judgment for fees due him with interest and an injunction.

The various issues presented in this appeal are herein discussed one by one, in the order indicated in the following outline:

False Claims Act case

Excessive fine unconstitutional

Multiple penal statutes violate constitutional rights

As no violation of F.C.A., fine erroneously imposed

Prior acquittal, correct and conclusive

Conflict of circuits, confused F.C.A. law

Ignoring stare decisis violates right to due process

Having paid principal in good faith, agent discharged

F.C.A. case and Plaintiff's case

No fair trial

Plaintiff's case

Tort proven

Rule 37 sanction proper against refusing governmental agencies

Defendants liable and not immune

Interest payable on unpaid debt

Injunctive relief necessary

Excessive Fine — Unconstitutional

This proceeding, once the False Claims Act controversy was introduced, has been dominated thereby, as intended by the government, naturally, for a huge fine is involved. This $131,606 fine is assessed against Dr. Peterson, jointly and

severally with his brother, James E. Peterson. Though brothers, the relation of these two ends there. They were not business associates here, James Peterson was the principal and operator. As to the brothers there are only differences, contrasts and opposites, as indicated by a review of the trial record. James is clever, sophisticated, a graduate of Harvard Business School, a promoter and exploiter. On the other hand, the appellant, a physician, is considerate, generous to a fault, trusting, naieve in business affairs and a humanatarian.

Two Supreme Court decisions are worthy of mention to the Court. In the earlier decision, *Pervear v. Mass.* (1867) 5 Wall 475, it was held that a fine of $50 plus 3 months imprisonment was not in violation of Amendment V, for operating a liquor store without a license. See also *Badders v. U.S.* (1916) 240 U.S. 391, 60 L.Ed. 706, 36 S.Ct. 367, which held a $7,000 fine not excsesive under Amendment VIII. Apparently the Supreme Court has never before been confronted with a case like the instant one, where clearly an excessive fine has been imposed.

In determining whether a fine is excessive, and therefore void under Amendment VIII of the Constitution, due consideration must be given to the fact situation. Here as indicated in the discussion of facts, appellant had no malicious intent. He had no knowledge of the wrongful act. He was an unknowing participant. The absence here of findings of fact on four important matters is significant, for if any such facts could have been found the lower court would certainly have

made them to support its verdict. As to the four facts hereinafter stated, the evidence proves as to Dr. Peterson that:

(a) he in no way participated in the filing,

(b) he knew not about the filing,

(c) he knew not about the false element in the claims, and

(d) he had no economic interest whatsoever in the claims.

The appellate court remarked on the good faith of appellant, as to his only act of participation, the writing of a check to Zodiac, who had performed the physical therapy services.

The participation of Dr. Peterson here is a *de minimis*, and it consisted of an act subsequent to and independent of the wrongful act of filing false claims. Under these facts the amount of fine assessed against Dr. Peterson is cruel and excessive, and therefore is invalid under Amendment VIII.

Multiple Penal Statutes Violate Constitutional Rights

Appellant's second contention on Constitutional grounds is this: the existing multiple Federal statutes create a situation which deprives appellant, and like persons accused, of rights guaranteed by the Bill of Rights, by imposition of excessive fines, double jeopardy[6] through harrassment of trials, and due process by deprival of any trial, as a practical matter.

There are many Federal penal statutes applicable to a single

[6] Double jeopardy protects against multiple punishments for the same offense. *U,S. v. Wilson* (1975) ..... U.S. ....., 43 L.Ed.2d 232, 241, citing *North Carolina v. Pearce* (1969) 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072.

act of an accused.[7] These penal statutes are in addition to the common law of the states, providing punishment for the wrongful acts of deceit and fraud. *U.S. v. Silliman* (CA3, 1948) 167 F.2d 607. Further, a review of the 7 Federal statutes, Exhibit E of Appendix, shows that the penalty of each statute is in addition to, not in lieu of, each other statute. To illustrate in the case at hand, Dr. Peterson after he had been found not guilty of violating Section 1001 of Title 18 extended considerable effort over many months to get dropped the indictments against him under Section 286 and Section 287 of Title 18, all brought on the same allegedly wrongful act. And now in the instant case, he must defend against charges brought under Section 231. All charges are predicted upon the one alleged wrongful act of appellant, namely, making payment of $15,300 to Zodiac, who performed the physical therapy services billed for by James Peterson. For the one act there should be one trial and one penalty, *Braverman v. U.S.* 317 US 49.

It is beyond the scope of a petition to summarize all the statutes, reconcile them, and the cases thereunder. But it is

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[7] Among the Federal penal statutes under which multiple charges may be brought for each single reimbursement form filed by a physician are the following: (Those marked with asterisk indicate charges were brought against the appellant in harrassment in the Federal courts).

Title	*Section*	*Charges Made*
18	286	*
18	287	*
18	371	*
18	1001	*
31	231	*
42	1395(nn)	
42	1395(h)	

(See also Exhibit G.)

readily apparent from Exhibit E of this petition, the complex penal scheme as an entirety is not unlike an octopus, providing Justice Department and the Bureau with many arms for attacking victims. Likewise, the multiple-statute scheme, enacted from time to time by changing Congresses over more than a century, is essentially a cobweb for entrapment. Because of the impossible situation created for an accused, they are unconstitutional, and thus are invalid as to this appellant. Is it not the purpose of the Bill of Rights to protect the people from overly abusive penal statutes enacted by the legislature?

Any person accused under these statutes, like the appellant, faces a dilemma, which may be defined as a situation involving a choice between equally unsatisfactory alternatives. This dilemma has been called a plea bargaining situation, where an accused accepts a lesser penalty to avoid the risk of trial on a threatened greater charge. And supposedly this procedure has social merit, and thus would be acceptable if one overlooks the individual's rights. When an accused is offered a lesser offense and penalty for a plea of guilty in lieu of multiple prosecutions, as a practical matter he must accept. He is a fool not to surrender his right to a trial. As a practical matter, though, accepting the plea bargain has deprived him of his right to trial, because for economic and other reasons he is compelled to accept the offer whether innocent or guilty. For example, here, though innocent, this physician has spent more than $30,000 in defending himself against the three criminal indictments alone, not including the instant charges under the False Claims Act. Thus, here there was no plea bargain made, and appellant

has stood trial and paid the high cost of defending against the multiple attacks. As a practical matter this second alternative of the dilemma is also unconstitutional. The accused's legal costs of multiple defenses amounts to an excessive fine. Appellant further contends the multiple harrassments become double jeopardy, which is prohibited by Amendment V. It is called to the attention of the Court that the harrassment of Dr. Peterson — his fines and legal costs — have not yet been ended, though in fairness and justice, as it exists in America, that should have ended.

It is appropriate to illustrate the excessiveness of fines, as applied to a physician presenting a "Request for Medicare Payment." For a single $8 office visit of a patient insured under Medicare, assume a physician with the assistance of his secretary files not one but two forms for the single treatment. As shown by the summary of the many statutes enacted by Congress, Exhibit E of Appendix, each of the conspirators may be charged with penalties of some $52,000 in fines and 26 years in prison. It is no defense to say the bureaucrats will be fair — look not further than the instant case. Nor is it a valid defense to say the Federal courts would prevent this, for as a practical matter many cases never reach the courts. For it is only a fool, like the accused here, who would fight to correct this wrong. Any reasonable accused entrapped in this cobweb would actually fight for the opportunity to enter his plea bargain, of guilty on a lesser offense to escape the more dangerous cobweb.

The situation here is simple. Congress has overlegislated,

giving to bureaucrats too many powers (here the Bureau of Health Insurance) and likewise Justice Department attorneys are overly vested with power. From this power has come abuse of rights. Here in the instant case the record against both groups is not clean, for they have both taken action against Dr. Peterson for ulterior motives. But the abuses arising from plea bargaining, in general and in this case, and how its use has deprived citizens of their rights, cannot be fairly presented in this petition. But in response to the Court's request, counsel would be pleased to amplify appellant's contention.

As No Violation of F.C.A., Fine Erroneously Imposed

The gravamen of the False Claim Act is simple: the act of filing a false claim. Here there was no evidence whatsoever, no findings of fact by the lower courts, connecting appellant with the *filing*. As clearly stated in both lower court opinions, the appellant's only connection with the claims is the act of depositing checks received. This later act is entirely independent of the *filing*, and was separated by 8 weeks of time.

The wrongful act under the F.C.A. is the mere *filing*, and it is immaterial whether checks are ever issued. For the intent of Congress was to discourage the presentation of false claims. Other penal statutes, and the common law crimes, are available for other wrongful acts. Here the separation is clear, as between the two wrongful acts, though the lower courts erred in not making a proper separation. On the one hand, the filing of these forms here was one act. On the other hand,

the handling of checks received 8 weeks later (the only act of appellant) is an entirely different, independent act. While the former act of filing may have been a violation of the F.C.A., the latter act is not. See the wording of the statute, Exhibit D of Appendix.

The error here may be explained by pointing out three findings of fact. These facts were not found as facts, for they were not proven by the evidence. But to find appellant guilty of violating the F.C.A., the lower court should have found in order to support its verdict: that,

(1) accused filed the claims,

(2) accused knew of the false element in claims when filed, and

(3) accused had the intent to defraud.

There was an absence of these essential findings. The spurious reasoning of the lower court to support its finding of guilt of appellant is unsound. Absent these findings, which cannot be made, the appellant cannot be held in violation of the F.C.A. The situation here is one where the court has concluded guilt though the essential facts serving as predicate for such guilt have not been found. The acts of the appellant, though he finds himself adjudged guilty, simply do not violate the terms of the statute.

Note that as to the separate crime of fraud, it would be predicated upon both the act of filing and the act of handling the money. Appellant has been tried on both, *U.S. v. Peterson, supra,* and found not guilty. In the instant case the wrongful

act is predicated only upon the *filing* alone. And in the lower court opinions it is admitted Dr. Peterson did not participate in the filing. His act was to pay the money to its apparent owner. The acts of Dr. Peterson do not constitute a violation of the F.C.A.

Prior Judgment of Acquittal Correct and Conclusive

In a previous decision involving the same allegedly wrongful acts Dr. Peterson was acquitted, see *U.S. v. Peterson* (CA5, 1974), *supra*, Exhibit C of Appendix. Appellant contends such acquittal was correct and also conclusive. A reading of that opinion shows a careful analysis was made of the evidence and facts, and it shows a keen insight. From the record the appellate court was able to discern the naivete of the accused from his testimony and conduct here.

As to the inconsistent results, an abhorrence of the law, appellant's principal contention here is that in the second case the court erred in evaluation of the circumstantial facts. The conclusion in the first decision is logical, as is apparent from reading it. If the second opinion is then read and compared with the former, the second is seen as deficient and illogical. Many significant facts, mentioned and considered in the first opinion, were ignored in the second opinion. For example, the marking out of the physician's address on one preprinted form, and inserting there in its place the Irving post office box of James Peterson. Another fact carefully developed in the second case involves the $2,300 overpayment carelessly made by Dr. Peterson. This substantiates the absence of any

intent by appellant to defraud, an essential element for any violation of the F.C.A.

Reference is here made to one of several inconsistent holdings here of the court of appeals. It is an inconsistency very confusing and frustrating to appellant's counsel, and very unjust to appellant. The same court on the same day, in fact the same judge, was inconsistent in the two opinions handed down by the court. Compare the opinion in the instant case (*Weinberger)* with that in *Peterson v. Blue Cross/Blue Shield of Texas* (CA5, 1975) 508 F2d 55, petition for writ of certiorari pending with U.S. Supreme Court. The latter case is a companion case to the instant case, except different causes of action and different parties are involved. There is also another companion case, *U.S. v. Peterson* (CA5, 1974), see Exhibit C of the appendix (this third case is referred to as the *Peterson* case and the first penal case.

The appellate court had a problem in writing its decision in the *Blue Cross/Blue Shield* case as no hearing was ever held, no evidence ever introduced. There was a deficiency in that there were no facts to support the conclusion made by the court of appeals. To solve this problem the court of appeals made the necessary findings in the instant case, the *Weinberger* case. Then, in its opinion in *Blue Cross/Blue Shield of Texas* the findings made in *Weinberger* are duly noted, adopted and followed in the *Blue Cross/Blue Shield of Texas* case. The appellate court did this on its own motion, not as a result of motions of the defendants. Thus the appellate court found itself bound and governed by its decision in a companion case,

both as to findings of fact and conclusions of fact contained in the companion case.

Now let us turn to two other companion cases, the first penal case (the *Peterson* case) and the second penal case, the instant case or *Weinberger* case. The appellate court in its opinion in the first penal case concluded that Dr. Peterson did not participate in making false statements, nor did he conspire to do so. This conclusion was reached after a careful analysis of the facts was made in a quite logical opinion. Now in the instant the previously made conclusions are not adopted, instead, the court now concludes to the contrary, though the same acts are involved. The exhibits are the very same forms as those presented in the first trial. The same one act, allegedly wrongful, by Dr. Peterson is involved — the payment of $18,000 to Zodiac; all the elements of the wrongful act in the instant case were evaluated and adjudicated in the first penal case.

Counsel concedes that a court is not always required to be consistent, for a court may be able to justify different results. But here no reconciliation was attempted. Why the inconsistency here, with the same act?

Conceding then for the moment that a court may from the same facts reach different conclusions on different days, what is more important here is the incredibility of the second decision. In the instant case, there has simply been a misreading of the circumstantial facts, drawing from them an improper conclusion. Without a comparison of the records, the two opinions alone, as reported, reflect sufficient grounds for

reversing the appellate court in the instant case. In the first penal case the material facts are stated, carefully analyzed and reasonable conclusions are drawn therefrom. In the instant case many of those significant facts are simply ignored, though the same exhibits are in evidence. By ignoring important facts, the court here in *Weinberger* came to a contrary conclusion, assessing this fine against Dr. Peterson. It is respectfully submitted the analysis of the facts made in the *Weinberger* opinion is less reasonable, less logical and the reasoning process expressed therein is less astute. Thus, petitioner contends that the instant case should be reversed on the merits, because the conclusions reached therein are contrary to the true facts. Some facts were proven and should have been found from the evidence. Other facts were found by the court, but ignored. Also, as previously noted herein, the facts missing from the opinion are such that it was error to hold that petitioner's acts violated the False Claims Act. In other words, the conclusion in the instant case, as opposite to the opinion in the first penal case, should be reversed, for it simply reflects a low quality of justice.

A second contention of appellant is that there was a merger, and in the first decision there was an adjudication of all elements of the wrongful act alleged in the second case now before the Court. For a discussion, see issue 5 in the opinion of *U.S. v. Peterson, supra,* page C-8 of Appendix. There is double jeopardy here. The issue here has been settled, doctrine of res judicata. There has clearly been excessive prosecution here, a harrassment, and estoppel should prevent the bringing of charges here against Dr. Peterson. See the recent

case on collateral estoppel, *Ashe v. Swenson* (1970) 397 US 436, 25 LEd2d 469, 90 S.Ct. 1189.

In the instant case there is less evidence presented against Dr. Peterson than was done in the first case. And in the first case the evidence was not sufficient to support his conviction. In the instant case it is important that the court made no finding that Dr. Peterson filed false claims, instead the facts and evidence show he did no filing. This second case violates the rules of fairness and justice, as they exist in the present-day Federal judicial system. This second trial is prohibited by Amendment V and Amendment VIII; the verdict against Dr. Peterson should be set aside.

Conflict of Circuits, and Generally Confused Law

It is rather modest to describe the state of the law (as to what constitutes a violation of the F.C.A.) as being merely a conflict of circuits. This was done in *U.S. v. Cooperative Grain & Supply Co.* (CA8, 1973) 476 F.2d 47. In the *Aerodex* case, *supra*, at page 1007, circuits 2, 5, 6 and 9 are said to be in conflict with circuit 10. In those lengthy decisions discussing "intent," "knowing" and "scienter" there is brief mention of many decisions, showing inconsistencies, conflicts and confusion in the law. But those opinions failed to rseolve any problems. As a result, a practicing physician with patients under Medicare cannot know whether his actions do or do not violate the statute. Nor can his attorney precisely advise him. The confused state of the law in itself constitutes a hazard, even for the honest physician. The risk of unknowingly violating an unclear statute may of itself be as cruel as a

punishment of violation. There is some confusion, moreover, even under the U.S. Supreme Court decisions, as to the scope of the statute and the nature of the act constituting a violation. tion.

Recently the Court made a new examination of the intent of Congress in enacting the False Claims Act, *U.S. v. Neifert-White Co.* (1968) 390 U.S. 228, 88 S.Ct. 959, 19 L.Ed.2d 1061. This case represents a return to the basics. But it necessarily serves to modify earlier, more technical decisions such as, *U.S. ex rel. Marcus v. Hess* (1942) 317 U.S. 537, 87 L.Ed. 443; *Rainwater v. U.S.* (1958) 356 U.S. 590, 2 L.Ed.2d 996, 78 S.Ct. 946; *U.S. v. McNinch* (1958) 356 U.S. 595 2 L.Ed.2d 1001, 78 S.Ct. 950.

It is more accurate to describe the condition of the law, as reflected in the various court decisions on Section 231, as utter confusion rather than as merely a conflict of circuits. As described in *Cooperative Grain & Supply*, the first aspect of the conflict is what test is to be used, for some circuits use "knowing" while others use "intent to defraud." Passing from which test is proper, then there is a question of what kind of *intent, and in Cooperative Grain & Supply* the 8th circuit rejected the 9th circuit's requirement of "specific intent." Another area of confusion, involved herein, is whether intent may be imputed from conduct.

In the instant case the appellate court opinion fails to say what test was used, and this too is error. The evidence here shows appellant knew not, and that appellant has no intent to defraud. So appellant is hard put, to understand or object to

the propriety of the test used by the appellate court. Whatever test may be adopted, under that test there would be here no violation of the F.C.A. By avoiding all tests, the lower court's spurious reasoning arrives at an unsupported conclusion as to Dr. Peterson.

Appellant suggests the proper test is to be found in the brief decision in *Neifert-White Co.*, that the statute be applied to all types of efforts to defraud, but there must be an intent to cause a financial loss to the Federal government.[8] The rule of *Neifert-White* is that an accused, to violate the statute, must have an intent to cause a financial loss to the government, and the type of means used is not material. Under this test the charges against Dr. Peterson would be dismissed, due to the lack of intent, and also there was no loss by fraud. Under the present state of the law as to Section 231, there is no way of knowing with any degree of certainty what act of a physician filing a Medicare assignment or other conduct, as here, constitutes a violation of the F.C.A. Admittedly, the new additional Medicare statute, 42 U.S.C. § 1395(n)(n), Exhibit D of Appendix, is clearly written, but it is an *addition to* not an *in lieu of* penal statute. Thus, this 1972 amendment to the Medicare Act simply increases the weight of the statutory penal scheme, giving more power to beaucrats for use in depriving citizens of their rights.

[8] Incidentally, it was stipulated here that the physical therapy services billed for were performed. Thus, there was no fraud on the government, except to the extent of negligent duplicate billings. These resulted in a duplicate payment of $33 to Concord Manor.

Ignoring Stare Decisis Violates Appellant's Right to Due Process

It is a basic principle of the American judicial system that an earlier decision of a court establishes a rule of law, and that precedent is controlling law, unless of course it should be reversed. Here the appellate court in *Priola, supra,* adopted a rule of law, but in the instant case adopted a contrary result, and then the appellate court refused to overrule or reconcile its prior decision. Such quality of justice, or rather lack of justice, is abhorrent to the American judicial system, and violates the due process rule of Amendment V of the U.S. Constitution.

Appellant points out that the case, *U.S. v. Priola* (CA5, 1960) 272 F.2d 589 establishes a rule of law which is controlling here. It held that intent may not be imputed under the False Claims Act. To the same effect, there must be a "scienter," see *U.S. v. Cooperative Grain & Supply Co.* (CA8, 1973) 476 F.2d 47, second paragraph on page 56. For the application of this test to James Peterson in the instant case, see the appellate court decision, Exhibit B of Appendix. But the courts, though requested to do so by appellant's counsel, never applied this test to Dr. Peterson, which test according to the statute is an essential element of any violation. As a consequence, the lower courts were able to reach an erroneous conclusion of violation by Dr. Peterson. A reading of the facts in the opinion, or the evidence in the record, shows that as to Dr. Peterson there was no "scienter." The court's conclusion was based on implied intent, which was derived from Dr. Peterson's handling of the checks received. This act of

Dr. Peterson occurred 8 weeks after the wrongful act of filing. Such a holding is inconsistent with the *Priola*[10] case, as was pointed out to the lower courts.

The lower court is not here following the law. The lower court should be required to overrule *Priola,* to follow *Priola* or to reconcile *Priola* with its holding in the instant case. That controlling precedent establishes the law, and in the instant case the court's holding is inconsistent with the law. Does this not deprive Dr. Peterson of due process? Is he not entitled to have the law, as established in *Priola,* applied to his situation here? For the courts not to follow the law in a case is to deprive the litigant of his right to due process, as guaranteed in the Federal court system by Amendment V. This material error, unfair and violative of appellant's rights, ought to be corrected.

The appellate court simply ignored appellant's contention, the principal argument made at the brief oral hearing, that the law of the *Priola* case required a dismissal of F.C.A. charges against Dr. Peterson. The appellate court has not followed the rule of stare decisis.

Moreover, the holding in *Priola* is sound. In the instant case it is significant that there was no finding as follows: That Dr. Peterson knew the forms when filed contained a false statement. Such a finding is essential to any violation of the F.C.A. But it is error to imply a knowing, when done from independent events occurring 8 weeks after the wrongful act

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[9] And other like decisions of the Fifth Circuit, which are consisted with Priola.

filing. Further, such subsequent events do not support any implication that he earlier filed claims with an intent to defraud.

The decision in the instant case, with a holding inconsistent with the well-settled law, violates appellant's right to due process; thus the decision should be set aside as being contrary to the Amendment V right guaranteed to appellant.

Having Paid His Principal, Agent Not Liable to Third Party

When a physician receives a Medicare check of another physician, usually he forwards it to the designated payee. And here, where Dr. Peterson knew that the physical therapy services has been rendered (which was stipulated to), he forward the money to Zodiac, who had incurred the cost of providing the services (wages of three therapists). This was done in good faith, for he knew not about the false element in the forms filed.

This payment was in conformance with the Texas law of Principal/Agency. Any special moneys of a principal coming into the hands of an agent are considered trust funds, and it is the duty of the agent to forward them to the principal, *Driskill v. Boyd,* 181 S.W. 715. The agent is thereby discharged from liability.

In the alternative, appellant contends it was error to hold him jointly and severally liable with James E. Peterson. The evidence shows that Dr. Peterson had no economic interest whatsoever in this physical therapy operation. In fact it shows he overpaid $2,300, which he has not received. Thus, due

to his reliance on the accuracy of his secretary in making the deposit Dr. Peterson sustained a loss. Under these circumstances it is proper to impose any fine primarily on the principal who conceived the plan, filed the forms and received all the benefits. Any liability of the trusting agent should be at the most a secondary liability, and recovery should be from the agent only after and to the extent the third party has failed to collect from the principal. Admittedly, the principal and agent are brothers, but they are definitely different persons. The naive physician, needless to say, is now less trusting of his brother. In all fairness and under the law the collection should first be made from the wrongdoer/principal himself to the extent of his assets, and then only subsequently from an unknowing, trusting agent.

Fair Trial Denied Appellant

The denial of a fair trial to appellant affected his rights, not only in Plaintiff's case but also his defense in the False Claims Act case. There are three principal facts indicating that a fair trial was denied appellant, (1) time, (2) number of witnesses and (3) the role of trial judge.

A pre-trial order (P.T.O.) was submitted by appellant, and the trial time estimates therein should be compared with actual trial times. This is indicated in the following chart

The Litigation	Hours of trial time P.T.O.	Estimate Actual	Actual trial time as % of estimated
Plaintiff's case	44	1.5	3.4%
False Claims Act case	16	20	125%
Total	60	21.5	34%

The reason why? The trial judge before the trial advised appellant's counsel there would be no trial of Plaintiff's case, and as he had promised there was not. There was a reversal of the order of trial on the first day, and the trial judge in the corridor advised appellant's witnesses to go home as there would be no trial. The trial judge said before the trial opened that it would end on Friday afternoon early. And then at 3:30 on Friday appellant's counsel was allowed to call his first witness. In the short remaining time counsel was allowed to call two witnesses, both hostile and both were defendants. The record shows the government was allowed to call appellant as a witness in order to prove up its case. But when appellant's counsel asked for the third time to call appellant, the trial was immediately ended, Transcript 742, 743.

The second fact is the number of witnesses of appellant, as follows:

Description	*Number*
Number of witnesses listed in appellant's pre-trial order	37
Number of witnesses allowed appellant at trial	2

During the trial when questioned by the trial judge as to what witnesses were to be called by appellant, counsel replied: "those listed in the pre-trial order." T. 680. But he was allowed to call as witnesses only two of the defendants.

The third significant fact is the role of the trial judge. Here is one instance: in the pre-trial order appellant's counsel asked

again for a hearing on the motion for a sanction for failure in pre-trial discovery. Finally, near the end of the trial (on the fourth and next to last day of the trial) appellant's counsel was able to get a hearing on that motion. A witness, Gruninger, one of the defendants, was called. During the short examination allowed by trial court appellant's counsel was interrupted in his presentation 15 times by the trial judge, and his role may fairly be described as that of an attorney representing the government.

The trial closed on an unjust note. We find appellant's counsel desperately trying to have at least the appellant testify as a witness. The trial judge's reply to this request was an order ending the trial.

Tort Proven

The three elements of a tort are (1) a wrongful act, (2) with intent, (3) resulting in damages. At the trial appellant was not allowed to prove damages, but the other two elements were proven, and the case should be remanded for hearings on the amount of damages sustained, if any. Though appellant could not testify for himself, nor his witnesses called, sufficient facts were proven indirectly from testimony of hostile witnesses to establish the tort.

Dr. Peterson was twice sanctioned, which incidentally is much more than a mere withholding of funds. He was sanctioned without any notice, without any determination, without any hearing. In fact, as indicated in the pre-trial order there was a total of 29 violations of the Federal Administrative Procedures Act. The sanctions were ordered here not by Jus-

tice Department or any penal officers of the government after due process, but by field investigators of the Bureau of Health Insurance, who had no authority to impose sanctions.

The sanctions were imposed in December, 1969 before the investigation was completed, prematurely. The sanction did not end at $20,000, but was continuing even after $80,000 had been withheld. Dr. Peterson was suspended, testified the investigators, on the belief Dr. Peterson billed for $22,000 of physical therapy services which had been previously billed and paid for by Concord Manor. For these agents to arrive at such a fallacious conclusion, there was gross negligence in the investigation, or perhaps there was an ulterior motive.

It should be noted here that these investigators were imposing these sanctions on the wrong person. The wrongful act, filing false claims, was done by James Peterson. Then why was Dr. Peterson sanctioned? This is indeed an interesting question. But it is not the responsibility of plaintiff, Dr. Peterson, to answer this. This is a part of the defendants' defense, to justify their wrongful acts. It is appellant counsel's belief, and belief of Dr. Peterson, that the investigators sought Dr. Peterson as a witness to testify against James Peterson, and these sanctions were used to pressure Dr. Peterson and induce him to cooperate, and accept a plea bargain offer.

Even after the government learned of their errors, there was a continuing abuse of Dr. Peterson to cover-up the errors. The sanctions were imposed for too long a period of time.

The file on Dr. Peterson was improperly retained in the

Bureau, and not forwarded to Justice until Dr. Peterson filed his petition in the Federal district court.

The imposition of sanctions at most should have been applied to Medicare payments, but here the scope was extended to two other programs other than Medicare.

A foreseeable consequence of imposing these sanctions was a taking away of patients from Dr. Peterson's medical practice, and this taking of property was done without due process.

Dr. Peterson tried again and again, but he could not get reinstated. All these foregoing, proven facts were sufficient to prove the wrongful act element of tort.

The element of intent was also proven. Obviously there was a conspiracy here among defendants. The imposition of sanctions required concerted action. The conspiracy is evidenced by the letters from the Bureau of Health Insurance to the three insurance companies, incidentally the letter to one insurance company has never yet been discovered by appellant's counsel. The two letters introduced in evidence on their face are patently deficient, for they contain no mention of any determination or notice. The sanctions were secretly imposed, and Dr. Peterson was not notified. Having established this, a prima facie case, then a presumption of malice arises, and the burden shifts to defendants, who here failed to introduce evidence to justify their actions.

The evidence shows a gross abuse of Dr. Peterson, his property and his administrative rights. The supervisor of these

field investigators was negligent; she testified she knew little about what was going on in the Peterson case. T. 223-243.

There was a conference held with Dr. Peterson, some six months after sanctions were imposed. That conference was not a hearing under the Administrative Procedure Act, but was for the purpose of giving *Miranda* warnings to Dr. Peterson and, they say, to obtain his confession!

Dr. Peterson requested specific charges and information about his case. He had a right thereto, *Goldberg v. Kelly* (1970) 397 U.S. 254. These demands, and Dr. Peterson's rights, were ignored by the investigators and their supervisor.

There was more harrassment of Dr. Peterson proven at the trial, but a recital of it is beyond the scope of this petition. The proof of these facts, contends appellant, is the proof of a wrongful act done with ulterior motives by a conspiracy of the defendants. It was error for the lower courts to conclude otherwise. The case should be remanded with instructions to conduct a hearing to determine the amount of damages due Dr. Peterson.

A review of the cases decided under the Federal tort claims act is beyond the scope of this petition. But a brief review was made, and it is appropriate to mention counsel's conclusions. The intent of the Congress, as enacted in the statute, is clear that there was to be a waiver of governmental immunity, and the statute should be liberally construed. The U.S. Supreme Court decisions have been consistent with this policy. But unfortunately the general application of the statute is to the contrary in the lower Federal courts and in the Justice

Department, each for different reasons have frustrated the policies of the Congress and the U.S. Supreme Court. The treatment accorded Dr. Peterson here in this case is a part of the insubordination mentioned.

Error Not to Impose Rule 37 Sanctions, When Governmental Agencies Refused Pre-trial Discovery

There was a failure in pre-trial discovery efforts made by appellant's counsel, who sought to inspect the entire case file on Dr. Peterson, and the principals Zodiac, Concord Manor and Greater Irving Home & Health Agency. Moreover, the government responses to appellant's interrogatories were evasive, inane and arrogant. Objections were timely made by appellant to the trial judge, and in the pre-trial order the outstanding motion for a sanction under Rule 37 was duly listed.

The trial judge refused several requests of appellant for a hearing on this motion, but finally the judge heard it on the fourth and next to last day of the trial. Thus, we find the persistent counsel for appellant on the fourth day of trial still trying to inspect the complete case file on Dr. Peterson, a part of his pre-trial discovery right under the Rules. At the trial the judge limited discovery to Rule 34, a production of documents, whereas appellant's counsel sought an inspection under Rule 26. Appellant's motion for imposition of sanctions was denied. This was error.

The indifference of this trial judge to Rules 26 and 37, as shown by the record in this case, reflects adversely on the Federal judicial system. His delay of the hearing and his denial of appellant's motion to impose a proper sanction

make the Federal Rules into a ridiculous mockery, an empty show. This result was not intended for the Rules. 28 U.S. U.S.C.A. § 2072.

Obviously there was a failure in discovery. The government witness, Carl Gruninger, a defendant, admitted the case files tendered to appellant's counsel were incomplete. T. 396-417. At least 15 important documents, obtained elsewhere, were not in the file. Other documents which obviously should be there, and were never seen by appellant's counsel, were missing. Some documents in the files made reference to other documents therein, but the other documents were missing.

It has been held that a failure to comply with a discovery order, which was the case here, is a refusal to obey, *Societe Internationale v. Rogers* (1958) 357 U.S. 197. The defendants could not explain the reason why documents were missing, though the burden was on them.

The proper action here is to impose the proper sanction, as provided by Rule 37. Appellant's counsel was seeking evidence to prove the wrongful acts, the existence of a conspiracy and malicious intent of the defendants. Presumptions should be made that appellant proved these facts, and a directed verdict entered, followed by hearings on actual and exemplary damages in tort.

DEFENDANTS HEREIN ARE LIABLE

The Federal government, and these government employees here, are liable for their torts against Dr. Peterson. Admittedly there is governmental immunity, but appellant contends there

is liability here under the Federal Tort Claims Act. The Act waives governmental immunity from suit in sweeping language. *U.S. v. Yellow Cab Co.* 340 US 543, 95 L.Ed2d 523, 71 S.Ct. 399. Also, there is individual personal liability for these field investigators of the Bureau of Health Insurance, who exercised police powers of the governmnet (which they did not possess) in ordering the insurance company defendants to impose sanctions on Dr. Peterson. Likewise, the insurance companies are liable in tort, for imposing sanctions on the basis of invalid orders, not issued by proper governmental authorities.

The exercise of police powers of the Federal government took place without any due process whatsoever, as if the Administrative Procedures Act had never been enacted. Appellant objects to abuse and deprival of 29 rights granted by this Act. Many of these abuses were proven.

The problem here is like that of most persons seeking recovery under the Federal Tort Claims Act. The Justice Department is over-zealous in putting up procedural stalls to prevent recovery from the government. The lower Federal courts, are not sympathetic to claimants of tort damages. Only the Supreme Court seems to comply with the statutes, which means many worthy claimant lose out to the hazards and costs of litigation, barriers to recovery and relief intended by Congress to damaged claimants.

We have here a worthy claimant. He had rights, and those rights were abused. He had a right to a hearing before his suspension, Title 19, § 1902(3), *Goldberg v. Kelly* (1970) 397 U.S. 254. There is liability if he is denied his right to a hear-

ing before sanctions are imposed, *Wood v. Strickland* (1975) ..... U.S. ....., 43 L.Ed.2d 214. There is definitely a tort liability, *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 38, 29 L.Ed.2d 619, 91 S.Ct. 1999.

The scope of the Supreme Court decision in *Goldberg v. Kelly* was limited by a court of appeals decision in *Hilburn v. Butz*, (CA5, 1972) 463 F.2d 1207. And here in the *Peterson* case it would be further limited, for the facts cited for the *Hilburn* exception are not existent here. In *Hilburn* there was a hearing at least, and the litigant could continue in business where here the physician could not.

The lower courts have proceeded here in their adjudication as if the *Bivens* case had never been decided. *Bivens* holds that liability exists. This decision has been followed by subsequent Supreme Court decisions clarifying and reducing the shield of governmental immunity, *Scheuer v. Rhodes* . . ., *Goss v. Lopez* . . ., and *Wood v. Strickland, supra.* But in the Fifth Circuit there seems to be a reluctance to give broad effect to these decisions. The instant case, thus, offers the Court an opportunity to emphasize further the changed and less-limited scope intended for governmental immunity, particularly when Federal investigators acts as policemen, judging and sanctioning and other acts clearly in excess of their authority.

As to other recent Supreme Court decisions in the same trend, reducing immunity and increasing liability, see *Doe v. McMillan* (1973) 412 U.S. 306, and *Logue v. U.S.* (1973) 412 U.S. 521. The situation with respect to governmental immun-

ity and liability may perhaps be described as: the Congress and Supreme Court are playing one musical tune, but the lower Federal courts and Justice Department have been marching to a different tune. The result, unfortunately, as reflected in the annotated code has been to deny payments to almost all claimants, even worthy ones.

The appellate court cites *Barr v. Matteo* (1959) 360 U.S. 564, then concludes that "all the agents were shielded by immunity." In the light of subsequent Supreme Court decisions, the cited authority, for governmental executives, fails to support their conclusion. These agents were only field investigators. They were not authorized to write letters to insurance companies directing them to sanction physicians. Their acts were wrongful, and they exceed the authority vested in them by the government. Therefore, they should be held personally liable.

The appellate court concluded that the three insurance companies were Medicare Intermediaries. Such conclusion is a finding of fact not warranted from the record. Only Group Medical & Surgical Service is a Medicare Intermediary, the other two companies are not. Further, governmental immunity should not be extended to Group Medical & Surgical Service. As testified to by the company's Vice-President, he considers his company not a governmental agency nor himself a governmental employee. Insurance companies who proceed to impose orders for sanctions which are patently invalid, should be liable in tort. The basic premise of the intermediary concept is to have an insurance company perform this function to escape

governmental bureaucracy procedures and rights, and quid pro quo, governmental immunity. The question here is how far, how far does immunity extend. Here there is error. Immunity has been extended too far, clearly.

Interest Payable on Unpaid Debt

The three insurance companies here complied with the letters they received from the Bureau of Health Insurance, naturally. They proceeded, as directed, to sanction Dr. Peterson, withholding payments and also all information about patient eligibility, processing of forms, etc. And they gave him no notice.

The appellant in this contention seeks only the interest due on the unpaid monthly balances, as distinguished from any tort damages. The unpaid balances consisted of uncollected fees due Dr. Peterson for medical services rendered his patients. Since the amounts withheld were substantial (as much as $89,000 at one time) and the harrassment continued for a prolonged period, the interest liability is estimated at about $14,000. As to the exact amount, the pre-trial discovery efforts produced only promises of counsel to produce insurance company schedules of the checks, from which the delinquency periods and amounts could be determined, and the interest could be computed check by check rather than estimated.

Incidentally, the interest liability would not be reduced here by the impact of the late-asserted "right-of-offset". A valid offset exists only after a claim has been asserted. Here the wrongful withholding occurred between December, 1969 and April, 1972, when the preliminary injunction order payments. The

crossfiling here for the $15,000 was not done until January, 1973, and even then no claim was asserted for the debt itself.

The issue is simple. The three insurance companies were debtors in default. Dr. Peterson, the creditor, is entitled to interest on the overdue debt. His claim is based in the law of contract of the State of Texas. Further, his right of collection is guaranteed by the U.S. Constitution under the special circumstances here. By reason of wrongful acts of Federal government employees, there was a taking of Dr. Peterson's property without due process of law. Therefore, he is entitled to just compensation therefor, as guaranteed by Amendment V of the U.S. Constitution. The trial judge should have awarded interest to Dr. Peterson, just as he had promised counsel immediately prior to the opening of trial, to obtain cooperation of counsel in changing the order of trial. It was error for the trial judge to change his pre-trial ruling, which was correct and in accordance with the law.

The principle of contract law involved here is itself not material. This contention, however, is significant to the Court, when considered with the other errors made below. It reflects truly the poor quality of justice in this case, the lower courts' indifference to law and finally their attitude towards any tort claimant who dares to file a petition in Federal court.

Injunctive Relief

An injunction is an extraordinary remedy, to be granted only when there is no other adequate remedy. The circumstances here warrant an injunction. The reputation of the

Bureau of Health Insurance is notorious, as to their high-handed investigators and their unlawful acts.

The wrongful, continuing acts here include:

1—imposing sanctions on the wrong person,
2—refusing to communicate (no hearing, no determination),
3—refusing to reinstate.

The wrongful acts here are acts of government agents, and their co-conspirators, overly cooperative insurance companies. Their wrongful acts of harrassment are contrary to Federal statutes, as follows,

1—42 USC 1395(a)—noninterference with medical practice,
2—42 USC 1395(g)—monthly payments,
3—42 USC 1395(n)(n)—hearings before suspension, fraud, etc.,
4— 5 USC 551-559—Administrative Procedures Act.

Moreover their wrongful acts are contrary to the case law, *Aquavella v. Richardson* (CA2, 1971) 437 F.2d 397 and *Carol Gables Convalescent Homes, Inc. v. Richardson* (D.Ct., Fla., 1972) 340 F.Supp. 646. And when the acts of the Department of H.E.W. deny due process to a provider under Medicare, an injunction to restrain such action is proper, *Carol Gables* case.

The wrongful acts cause irreparable damage to the medical practice of Dr. Peterson, causing him to lose patients and turn away patients from his office, and they will never return. Thus, there is no other adequate remedy.

There is no government plan for reinstatement of Dr. Peterson after the termination of this litigation. So testified Mrs. McSteen, a defendant who previously suspended Dr. Peterson and who now serves with the same authority at the Bureau. The attitude of the Bureau and of these investigators towards the law and toward Dr. Peterson has not changed. Their wrongful acts include 29 violations of the Administrative Procedures Act. This gross conduct against Dr. Peterson, this flagrant disregard of statutes, indicates their attitude. Unless restrained by an injunction and directed specifically to obey the law as to this physician, their sanctions, their wrongful acts, will be continued.

The trial court stated there was no denial of due process here, citing a case describing the concept of due process as "elusive." It is respectfully submitted — a reading of Title 5, Sections 551-559 dispels the elusiveness, and that was the Congressional intent. Appellant is entitled to the protection intended by Congress from these provisions. As defendants fail, and refuse, to comply with the Federal statutes, they should be ordered by the courts to do so.

What appellant seeks here, in plain language, is a permanent and final end to this harrassment, which is continuing even today. Only an injunction will accomplish this.

CONCLUSIONS

The more material issues presented in this case are presented in outline form. Only the issues of general significance are mentioned in the conclusion. The first five issues relate to the False Claims Act case, the next three issues arise from Plaintiff's case and the final issue involves both cases.

1. There is considerable confusion in the law as to what conduct constitutes a violation of F.C.A. Persons filing claims and employees preparing claims are entitled to a clearer law.

2. There is a conflict of circuits as to "intent to defraud," "knowing" and other elements of the False Claims Act.

3. What is an excessive fine under Amendment VIII? The amount of $131,600 here for this appellant is unconstitutional.

4. The plea bargaining situation arising from multiple penal statutes deprives an accused of his rights, or imposes an excessive fine, depending on accused's decision on prosecutor's offer. In either event the statutes must be declared unconstitutional.

5. How many times may an accused be tried for the same alleged wrongful act, especially when he was first adjudged not guilty?

6. An injunction is to be issued only in circumstances where necessary, as here, to compel executive branch to obey valid Federal statutes.

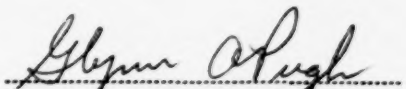
7. The lower Federal courts are obligated to follow, as to the Federal Tort Claims Act, the intent of Congress as set forth in the statute and the U.S. Supreme Court decisions.

8. Proper sanction (directed verdict) is to be imposed under Rule 37 of Fed. Rules of Civ. Proc., where executive departments of government refuse pre-trial discovery efforts in a tort case against the Federal government.

9. Denial of appellant's requests to call appellant as a witness was a denial of a fair trial, where appellant was plaintiff and also defending against a cross-claim, and particularly where appellant was allowed to call only two witnesses, both hostile.

As these issues are material, substantial and important, the Court should grant this petition for writ of certiorari.

Respectfully submitted,



Glynn A. Pugh, Attorney for
Petitioner, Donald M. Peterson

APPENDIX

SCHEDULE OF EXHIBITS

Exhibit A—*Peterson v. Weinberger* (Dist. Ct. Tex., 1973) F.Supp. 1259, a copy of trial court's opinion in instant case A1

Exhibit B—*Peterson v. Weinberger* (CA5, 1975) 508 F.2d 45, a copy of the decision in instant case in the appellate court B1

Exhibit C—*U.S. v. Peterson* (CA5, 1974) 488 F.2d 645, prior decision of court of appeals on identical facts, absolving appellant C1

Exhibit D—Constitutional and statutory provisions—texts thereof D1

Exhibit E—Summary of Federal penal statutes applicable to a Medicare or Medicaid claim E1

Exhibit F—Order denying petition for rehearing F1

EXHIBIT A

Donald M. PETERSON, D.O., Plaintiff,

v.

Elliott L. RICHARDSON, Secretary of Health, Education and Welfare, et al., Defendants,

v.

James E. PETERSON, Third Party Defendants.

Civ. A. No. CA-3-5158

United States District Court, N. D. Texas, Dallas Division.

Oct. 29, 1973.

MEMORANDUM OPINION

ROBERT M. HILL, District Judge

Dr. Donald M. Peterson filed this action against the Department of Health, Education and Welfare (hereinafter "HEW") and certain government officials and insurance carriers who administer the Medicare Act. He seeks injunctive relief reinstating him as a participating physician under the medicare programs and the recovery of certain sums which have been withheld from him under the medicare programs. He also seeks compensatory and punitive damages against individual defendants for suspending his medicare payments. Defendant United States of America filed a counterclaim against Dr. Peterson and a third party complaint against his

brother, James E. Peterson, alleging that they made and presented, or caused to be made and presented, false, fictitious and fraudulent claims for payment of medical treatment and services rendered to medicare beneficiaries. This counterclaim and the third party complaint were brought pursuant to the False Claims Act, 31 U.S.C. § 231.[1]

Dr. Peterson's Suspension

Dr. Peterson is a licensed physician of osteopathy practicing in the City of Dallas. A large portion of his practice is devoted to the care and treatment of patients eligible to receive medicare benefits. In June of 1969 a complaint relating to Dr. Peterson was received by the Bureau of Health Insurance (hereinafter "BHI"), a department of HEW. Defendants James A. Adams (hereinafter "Adams"), Donald Paul Chancellor (hereinafter "Chancellor") and Carl Gruninger (hereinafter "Gruninger"), employees of HEW, then commenced an investigation of certain claims for medicare payments submitted in April of 1969 for services rendered by Dr. Peterson in the spring of 1968. During this investigation defendant Martha A. McSteen (hereinafter "McSteen") was the regional represen-

[1] Relevant portions of this Act are:

"Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . shall forfeit and pay to the United States the sum of $2,000, and in addition, double the amount of damages which the United States may have sustained by reason of the doing, or committing such act . . ."

tative of the BHI and in that capacity she supervised the investigation.

In December of 1969 it was determined from this investigation that 123 fraudulent claims had been presented to defendants Blue Cross-Blue Shield of Texas (hereinafter "Blue Cross-Blue Shield"), Group Hospital Service, Inc. (hereinafter "Group Hospital"), and Group Medical and Surgical Service (hereinafter "Group Medical"), all of whom are insurance carriers and fiscal intermediaries disbursing medicare and medicaid funds solely at the direction of BHI. This determination was based on HEW's finding that the medical treatment described in the claims was not rendered or personally directed by Dr. Peterson. As a result of this determination, Gruninger made the decision to suspend all medicare and medicaid payments to Dr. Peterson This action was taken pursuant to BHI regulations and also in accordance with the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies.

Further investigation continued until October 6, 1971, when the matter was referred to the United States Attorney for criminal prosecution. On September 8, 1972, an indictment was returned by the grand jury charging Dr. Peterson and James E. Peterson with submitting false claims under the medicare program. Following a trial, James E. Peterson was found guilty on thirty-nine counts of submitting false claims and Dr. Peterson was found guilty on one count of conspiracy to defraud the United States. These convictions are now on appeal.

On October 28, 1971, this court issued a preliminary injunction directing HEW to rescind the suspension of Dr. Peterson as a participating physician in the medicare and medicaid programs and to direct its intermediaries to process and to pay all claims submitted by Dr. Peterson for his services under these programs.

I. *Dr. Peterson's Complaint*

Dr. Peterson urges three causes of actions. First, he seeks a money judgment for breach of contract since the defendants withheld some $90,000 for services which he had rendered under the medicare program. He claims that this was a malicious breach of contract, which under Texas law entitles him to tort damages and punitive damages. Second he alleges some seven different torts, all of which involve alleged maliciousness on the part of the individual defendants in suspending him from the medicare program and in withholding payments for services actually rendered under the medicare program.[2] Finally, he seeks a permanent injunction directing HEW to reinstate him as a participating physician under the medicare and medicaid programs and to refrain from ever again suspending him unless in compliance with the laws of the United States. This court is of the opinion that none of Dr. Peterson's causes of action are meritorious.

[2] The seven alleged torts are as follows: (1) invasion of, or interference with, property rights; (2) taking of property without due process of law; (3) maliciously inducing Blue Cross-Blue Shield and Travelers Insurance Company to breach their contract with Dr. Peterson; (4) extortion by "cruel devices" with deliberate intent to create total anguish and physical injury; (5) malicious conspiracy to punish without due cause; (6) malicious breaches of contract by Blue Cross-Blue Shield of Texas and Travelers Insurance Company; (7) interference with contract rights.

A. *Breach of Contract and Tort Causes of Action*

[1] This court is of the opinion that Dr. Peterson's first and second causes of action are without legal merit. Defendants McSteen, Adams, Gruninger and Chancellor are clearly immune from any liability under the doctrine of official immunity announced in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). In *Barr*, the Court held that the Acting Director of the Office of Rent Stabilization was immune from the libel laws of the District of Columbia for statements made within the scope of his employment, notwithstanding the fact that he acted with a malicious motive. The Court reasoned that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." 360 U.S. at 571-572, 79 S.Ct. at 1340. There has been no showing that the actions of defendants McSteen, Adams, Gruninger and Chancellor were outside the scope of the statutes, regulations and instructions in force at the time. The trial testimony indicates that these defendants were acting within the scope of their employment and pursuant to the directions of HEW to discover fraud in the submission of claims under the Medicare Act. No liability can be imposed on these individual defendants pursuant to Dr. Peterson's cause of actions since these defendants have acted solely in their official capacities.

[2] The defendants Blue Cross-Blue Shield, Group Hospital and Group Medical are also immune from any liability pursuant to Dr. Peterson's first and second causes of action. These defendants are insurance carriers who administer the

medicare and medicaid programs at the direction of HEW pursuant to the provisions of 42 U.S.C. §§ 1395h and 1395u. Regulations established pursuant to these statutes provide that:

> "In the performance of their contractual undertakings, the carriers act on behalf of the Secretary, carrying on for him the administrative responsibilities imposed by the law. The Secretary, however, is the real party in interest in the administration of the program . . ." 20 C.F.R. § 405.670 (1973).

It is clear from these provisions and regulations that these carriers are agents of the United States. Since the evidence shows that they were acting within the scope of their agency relationship with HEW and in accordance with the applicable statutes, regulations and directive of HEW, any liability would be that of the United States. Johnson v. Johnson, 332 F.Supp. 510 (E.D.Pa.1971); Kuenstler v. Occidental Life Insurance Co., 292 F.Supp. 532 (C.D.Cal.1968).

[3-5] This court cannot find any basis in this case to impose tort liability on the United States for the conduct of its employees and the actions of HEW agents in suspending Dr. Peterson as a participating physician and in withholding the processing of all other payments to him when the fraudulent claims were discovered. This conduct was neither malicious nor unreasonable. HEW had the right to withhold Dr. Peterson's medicare payments under 31 U.S.C. § 227 as an offset for any final judgment rendered against him under the False Claims Act. In view of the determination, *infra*, that Dr. Peterson

did cause to be made a false claim, this court can find no tortious conduct on behalf of the United States, its employees and its agents. The court is also of the opinion that any liability for breach of contract was vitiated by the fraudulent conduct of Dr. Peterson as determined *infra*. Additionally, Dr. Peterson's claims against the United States for interference with contract rights and malicious prosecution are clearly barred by the terms of the Federal Tort Claims Act, 28 U.S.C. § 2680(h).

B. *Cause of Action for Injunctive Relief*

[6] Dr. Peterson alleges that he was denied procedural due process when HEW withheld his medicare payments and suspended him as a participating physician during the investigation of the fraudulent claims. This allegation is without merit. As the Supreme Court stated in Hannah v. Larche, " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L.Ed.2d 1307 (1960). This court is of the opinion that within the "factual contexts" of this case, Dr. Peterson was afforded procedural due process.

Dr. Peterson and his attorney met in defendant Gruninger's office on June 18, 1970, for about two hours. After he was given the *Miranda* warnings, Dr. Peterson was informed that his medicare payments were being withheld pending the investigation of possible fraudulent claims which had already been paid. He was also advised that there was no dispute as to the validity of the claims being withheld from payment, but that

they were being withheld as an offset against any potential liability to the government. 31 U.S.C. § 227. During this conference, Gruninger outlined the reasons why HEW had reached the conclusion that the medicare claims in question were fraudulent and he cited specific instances. The conference was terminated with an agreement that HEW would write a letter outlining the allegations of fraud and that Dr. Peterson would then write a reply letter of explanation. Following the exchange of these letters, HEW rejected Dr. Peterson's contention that the medicare services covered by the disputed claims were rendered under his personal direction and thus were not fraudulent.

The decision to suspend Dr. Peterson and to withhold his medicare payments was in response to the determination by HEW that he had not rendered or personally directed the treatment described in the 123 claims To require HEW to hold any additional hearings on the suspension of Dr. Peterson and the withholding of payments would necessitate a determination by HEW on the merits of the fraudulent medicare payments, a determination which was properly reserved for the courts in the subsequent criminal prosecution and civil litigation where the full "panoply" of judicial procedures were available to Dr. Peterson. Therefore, under these circumstances,[3] the proceedings afforded Dr. Peterson by HEW were consistent with the constitutional dictates of procedural due process.[4]

[3] [W]hen a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).

[7] Additionally, any injury to Dr. Peterson was rectified when this court issued the preliminary injunction on October 28, 1971. As a result of this court's determinations, *infra*, this court is of the opinion that the preliminary injunction in favor of Dr. Peterson should be dissolved and that his request for permanent injunctive relief should be denied.

II. *The Counter Claim and Third-Party Complaint*

In response to the original complaint, the United States has asserted a counterclaim against Dr. Peterson and a third-party complaint against James E. Peterson pursuant to the False Claims Act, 31 U.S.C. § 231 et seq. It is alleged that they made and presented, or caused to be made and presented, false claims for payment of medical treatment and services purportedly rendered to medicare beneficiaries.

A. *James E. Peterson*

[8] James E. Peterson was the principal owner and director of Concord Manor Nursing Home (hereinafter "Concord"); He was also the president and owner of Zodiac Enterprises, Inc. (hereinafter "Zodiac"), a subsidiary of Concord, which provided the services of registered physical therapists and physical therapy aids for nursing homes. Until March 1, 1969, Concord was certified to be reimbursed under Part A of the Medicare Act for in-hospital expenses and services (including physical therapy) rendered by Concord on behalf of medicare

[4] Administrative procedures for resolving any dispute Dr. Peterson may have had with the *carriers* were available pursuant to the provisions of 20 C.F.R. 405.801. There is no evidence that Dr. Peterson or his attorney ever attempted to invoke these procedures for an administrative review.

beneficiaries. Payments for these expenses and services come exclusively from a federal trust fund. Concord was never eligible to receive payments for Part B expenses which relate to physician services. On March 1, 1969, Concord and James E. Peterson were notified by a medicare carrier that due to Concord's failure to file cost reports, payments for physical therapy treatment rendered under Part A would be suspended.

During the month of April 1969, Group Medical received 123 "Request for Payment-Medical Insurance Benefits" claims under Part B. These claims were for physical therapy actually rendered a year earlier by Zodiac to patients at Concord. All but eight of these claims bore a signature purporting to be that of Dr. Peterson certifying that the physical treatment was rendered personally by him or under his personal direction. Additionally, all 123 claims bore the "physician code" number assigned to Dr. Peterson. Representatives of Group Hospital testified that Dr. Peterson's purported signature certifying that treatment described in each claim had been rendered by him or under his personal direction was a material statement upon which they relied in approving the payment of the 123 claims. Consequently, Dr. Peterson received medicare checks for each claim, totaling $16,153.44. These checks were deposited by Dr. Peterson in his bank account. He then wrote and delivered a check to Zodiac covering the deposit. It is the contention of the government that these 123 claims were actually submitted by James E. Peterson and were false and fraudulent claims since Dr. Peterson did not personally render or personally direct the treatment described in the 123 claims.

It is undisputed that Dr. Peterson did not sign these claims. Lucille Morton, an employee of Zodiac and Concord, who was charged with the responsibility of preparing claims for medicare payments, testified that she signed Dr. Peterson's name and physician code number to the disputed claims at the direction of James E. Peterson. James E. Peterson testified that he never directed Lucille Morton to sign his brother's name on the claims, however, he could offer no reasonable explanation as to why Lucille Morton would submit these claims bearing Dr. Peterson's signature and physician code number.

It is clear from the evidence that only James E. Peterson could benefit from his brother's signature on these claims. Since Concord was suspended from receiving any payments under the medicare programs the only way it could be paid for the treatment rendered before suspension, would be to submit claims under Part B. Part B, unlike Part A, requires a certification that the treatment was rendered by or under the personal direction of a physician. James E. Peterson was well aware of this requirement as demonstrated by a chart he personally prepared and introduced into evidence showing that Part B was "billable by physicians only." Further, Dr. Peterson testified that when he received the medicare checks, James E. Peterson requested that the proceeds be sent to Zodiac since the treatment was rendered by Zodiac. This court thereby finds that James E. Peterson knew that the claims required a physician's certification and that James E. Peterson instructed Lucille Morton to sign Dr. Peterson's name to these claims. This court concludes that James E.

Peterson violated the False Claims Act by submitting the 123 claims.

[9] James E. Peterson urges that these claims were not false since the treatment was actually rendered under the "personal direction" of Dr. Peterson in his capacity as medical director of Zodiac. Dr. Peterson and James E. Peterson testified that Dr. Peterson was the medical director of Zodiac. However, Helen Maeker, the only registered physical therapist for Zodiac, testified that she did not know that Dr. Peterson was the medical director. She also testified that he never gave her any directions in regard to the administration of physical therapy, nor was he present when she rendered any physical therapy in connection with these claims She was never told to consult with Dr Peterson with regard to any problems that may be encountered in performing physical therapy. The only contacts she had with Dr. Peterson were through his patients at Concord.

Helen Mathis, the director of nursing at Concord, also testified that she did not know that Dr. Peterson was medical director, nor did she ever see him supervise the administration of physical therapy at Concord. Lucille Morton, secretary-bookkeeper for Zodiac, did not know that Dr. Peterson was the medical director of Zodiac, nor was he ever compensated as a medical director of Zodiac. Weighing the testimony of these witnesses, this court finds that Dr. Peterson was not the medical director of Zodiac. Assuming however, that he was the medical director of Zodiac, the court finds that Dr. Peterson neither directed nor supervised the administration

of the treatment described in the 123 claims submitted by James E. Peterson. Thus, these services were not services of a physician payable under Part B of the Medicare Act. This court finds that the 123 claims submitted by James E. Peterson were false and that he knew that they were false.

B. *Dr. Peterson*

[10, 11] In response to the 123 claims submitted by James E. Peterson and in reliance of the purported certification that the treatment was rendered by Dr. Peterson or under his personal direction, Group Medical issued checks totaling $16,153.44 to Dr. Peterson as payee. These checks were deposited by Dr. Peterson with the knowledge that he had rendered no services related to these checks. The proceeds of these checks were then delivered to Zodiac. This court concludes that the act of Dr. Peterson in endorsing these checks and depositing them for collection with the knowledge that he was not entitled to the proceeds of the checks constitutes the making of a false claim as to each check. 31 U.S.C. § 231. United States v. Branker, 395 F.2d 881 (2d Cir. 1968); United States v. Scolnick, 219 F.Supp. 408 (D.Mass.1963). Further, the acts of Dr. Peterson, in combination with those of James E. Peterson, aided James E. Peterson in obtaining the funds paid on these false claims. The conclusion is inescapable that Dr. Peterson knew he was aiding James E. Peterson in obtaining payments on these false claims. Thus, Dr. Peterson is liable to the government on each claim under the provisions of 31 U.S.C. § 231.

III. *Conclusion*

From the foregoing, this court concludes that Dr. Peterson

and James E. Peterson have violated the provisions of the False Claims Act and that the United States is entitled to recover from Dr. Peterson and James E. Peterson the sum of $16,153.44, plus damages pursuant to the provisions of 31 U.S.C. § 231. Additionally, Dr. Peterson is not entitled to injunctive relief, tort damages or breach of contract damages against the defendants in this case. Counsel for the government is directed to submit an order consistent with this opinion.

JUDGMENT

On June 18, 1973, this cause came on for trial before the court and having heard the evidence and the argument of counsel, the court is of the opinion that judgment should be entered in accordance with its Memorandum Opinion which was filed on September 5, 1973. In that Memorandum Opinion the court found that Plaintiff Donald M. Peterson was not entitled to injunctive relief, tort damages or breach of contract damages against any of the defendants. The court further found that third party defendant James E. Peterson knowingly submitted 120 false claims for Medicare payments to the United States of America in violation of the False Claims Act, 31 U.S.C. § 231, and that Donald M. Peterson knowingly cashed checks in payment of such false claims and thereby aided James E. Peterson in submitting the 120 false claims in violation of the False Claims Act.

[12] The language of the False Claims Act provides that "any person . . . [who shall commit any of the acts prohibited] . . . shall forfeit and pay . . . the sum of $2,000,

and, in addition, double . . . damages." This statute has been interpreted as permitting the imposition of a separate forfeiture for each separate violation of the statute. United States v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1942); Faulk v. United States, 198 F.2d 169 (5th Cir. 1952); United States v. Ueber, 299 F.2d 310 (6th Cir. 1962). The purpose of the $2,000 forfeiture provision is to reasonably indemnify the government for all losses arising from the false claims. The forfeiture was meant by Congress to reflect a fair ratio to damages in order to make sure the government would be made completely whole. United States v. Hess, *supra;* Toeleman v. United States, 263 F.2d 697 (4th Cir. 1959); United States v. Beatrice Foods Co., 330 F.Supp. 577 (N.D. Utah 1971).

[13, 14] Having considered all the evidence in this case and the efforts which the government has made in prosecuting these false claims, this court is of the opinion that the assessment of a $2,000 forfeiture for 120 false claims would be unreasonable and not remotely related to both the actual losses and inexplicable damages incurred by the government. This court concludes that the assessment of a $2,000 forfeiture for 50 of the false claims plus double damages for all 120 of the false claims would reasonably indemnify and make the government whole for the false claims made by James E. Peterson and Donald M. Peterson. The court is further of the opinion that interest should not be allowed on the money judgment but should be calculated from the date of entry of this judgment, at a rate allowed by state law. United States v. Foster Wheeler Corp., 447 F.2d 100

(2d Cir. 1971); United States v. Globe Remodeling Co., 196 F.Supp. 652 (D.Vt. 1961).

It is therefore ordered that plaintiff Donald M. Peterson take nothing by his action against all defendants and that his complaint be in all things dismissed; and,

It is further ordered that the United States of America recover of and from Donald M. Peterson and James E. Peterson, jointly and severally, the sum of $31,606.72, representing double damages for the 120 false claims in question; and,

It is further ordered that the United States of America recover of and from Donald M. Peterson and James E. Peterson, jointly and severally, the sum of $100,000 representing a $2,000 forfeiture for 50 of the 120 false claims in question; and,

It is further ordered that interest shall be recoverable on all amounts awarded from the date of this judgment at the rate allowed by Texas law; and,

It is further ordered that the preliminary injunction heretofore issued in this cause is dissolved and of no further force and effect.

EXHIBIT B

Donald M. PETERSON, Plaintiff-Appellant,

v.

Caspar W. WEINBERGER, Secretary of Health, Education and Welfare, et al., Defendants-Third-Party Plaintiffs-Appellees,

v.

James E. PETERSON, Third-Party Defendant-Appellant.

No. 74—1067.

United States Court of Appeals,
Fifth Circuit.

Feb. 14, 1975.

Physician brought action for alleged wrongful withholding of funds due him under the Medicare Act. The government filed a counterclaim against the physician and a third-party complaint against operator of nursing home for submission of false medicare claims. The United States District Court for the Northern District of Texas, Robert M. Hill, Jr., 370 F.Supp. 1259, rendered judgment in favor of the government and appeals were taken. The Court of Appeals, Dyer, Circuit Judge, held that conduct of employees of Bureau of Health Insurance in suspending physician from medicare program after investigation revealed possible fraud in submission of medicare claims was not malicious, negligent or unreasonable; that withholding of funds due physician as offset against false claims under investigation did not deny due process; and that evidence sustained determination that physician and

operator were liable to the United States under False Claims Act.

Affirmed.

Appeals from the United States District Court for the Northern District of Texas.

Before DYER, SIMPSON and CLARK, Circuit Judges.

DYER, Circuit Judge:

James E. Peterson and his brother, Dr. Donald M. Peterson, appeal from a money judgment entered against them for submitting false claims against the Government. Dr. Peterson also appeals from the denial of his entitlement to injunctive relief and tort and breach of contract damages against the defendants. We affirm.

Although much of the complicated statutory and factual background of this and the cognate cases[1] has been treated in the district court's opinion,[2] and in this Court's opinion on the appeal of the criminal trial of the Peterson brothers,[3] a recount of the salient facts is helpful to focus upon the issues raised by the Petersons.

James Peterson was the president, director, and a 69 per cent stockholder of Concord Manor Nursing Home, an extended care facility. He was also the sole owner of Zodiac Enterprises, Inc., which contracted with Concord and other nursing homes to provide physical therapy services to their

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1 Peterson v. Blue Cross and Peterson v. West, 5 Cir. 1975,— F.2d —, this day decided.

2 Peterson v. Richardson, N.D. Tex. 1973, 370 F.Supp. 1259.

3 United States v. Peterson, 5 Cir. 1974, 488 F.2d 645.

patients. In 1968, Concord was a certified provider of services under Part A of the Medicare program. Medicare payments were handled through a fiscal intermediary, Mutual of Omaha, to whom Concord submitted its bills for services rendered at the nursing home at a daily rate which included physical therapy. Zodiac could not submit bills for its physical therapy services directly to the Medicare intermediary because Zodiac and Concord were related corporations, *i. e.*, James Peterson was the sole owner of one and held the controlling interest in the other. Therefore, the only way Zodiac could be reimbursed by Medicare for its services was for Concord to include physical therapy in its bills to Omaha. Only the cost, without profit, of services rendered was reimbursable. Concord was required to file cost reports each year with Omaha so it could determine the appropriate allowable cost. Concord failed to file these reports for 1967, and after three notices and the reduction of allowable daily rates, payments were stopped on March 1, 1969, and it ceased being a provider on August 31, 1969.

Thus, early in 1969, James Peterson was faced with a dilemma regarding physical therapy services: Zodiac could not bill directly for therapy services it had furnished to Concord in the first six months of 1968, and payments to Concord under Part A had been stopped. Thereupon, Peterson directed his employee, Morton, to prepare Part B claim forms and "get them out as soon as possible so he could get the money back in." This necessitated the use of a form different from that used for Part A in that it required a

physician's personalized provider number and the physician's signature certifying that the service had been rendered by him personally or under his personal direction. Morton and another employee prepared 120 Part B claims, signed Dr. Peterson's name and provider number to them, and put James Peterson's Post Office box number on the forms rather than Dr. Peterson's address. Morton testified that "Mr. Peterson gave us the instructions on all of the forms."

The Part B claims for Medicare payments were then sent to Blue Cross/Blue Shield of Texas which operated the Medicare program as an agent of the United States on a non-profit basis pursuant to a written contract executed under the provisions of 42 U.S.C.A. §§ 1395h and 1395u. All of the claims were paid by checks made payable to Dr. Peterson and mailed to him.

The circumstances surrounding Dr. Peterson's receipt and handling of the checks are far from clear. He testified that he assumed the checks were made out and sent to him because he was the medical director of Zodiac. He called his brother to find out why he got checks for physical therapy that he had not billed. James Peterson told him that "the claims had been filed." The doctor didn't ask why the checks had been made to him, nor did he contact Group Medical. He simply told James Peterson that he would forward the funds. Instead of endorsing the checks, Dr. Peterson deposited them to his own account and sent his personal check with a notation "account payable" to James Peterson, who deposited it in the Zodiac account.

Dr. Peterson was not on the payroll of Zodiac. He knew that the 120 checks payable to him did not belong to him. He knew he had never personally rendered any of the services in question. Subsequently and inexplicably, Dr. Peterson received six invoices from Zodiac for the therapy services rendered during the first six months of 1968 at Concord which comprised the 120 claims. Dr. Peterson did not pay the amount of the invoices because he "didn't think he owed the money." James Peterson's version was that Dr. Peterson had been billed for physical therapy services rendered while the doctor was medical director of Zodiac. He claimed that Dr. Peterson's check was in payment of the invoices. This is inexplicable because Dr. Peterson sent his check to James Peterson on June 3, 1969, and the Zodiac invoices were not prepared or sent to Dr. Peterson until July, 1969. Moreover, neither James Peterson nor Dr. Peterson could give any plausible explanation why Zodiac should bill its medical director for services its physical therapy department performed. Finally, also without explanation was the notation on Dr. Peterson's check to Zodiac, "account payable."

In July, 1969, a complaint was received by Gruninger, Program Integrity Specialist, Bureau of Health Insurance, Department of Health, Education and Welfare. The niece of a Medicare beneficiary at Concord questioned the payment to Dr. Peterson for physical therapy services not rendered by him. There followed an investigation concerning claims filed over the signature of Dr. Peterson for physical therapy rendered at Concord for the first six months of 1968 and sub-

mitted for payment in April of 1969. The investigation revealed that although Dr. Peterson's name appeared on the claim forms, he had not personally rendered the services, nor had they been performed under his personal direction. In December, 1969, because of the possibility of fraud, Gruninger issued a letter to Blue Cross/Blue Shield ordering suspension of further payments to Dr. Peterson under the Medicare program. In May, 1970, a conference was held with Dr. Peterson in which he was given an opportunity to respond to accusations made against him. Through counsel he subsequently replied by letter. The suspension, however, remained in effect.

Dr. Peterson responded by filing suit seeking to enjoin the defendants from wrongfully withholding funds due him under the Medicare Act. He also alleged that certain torts precipitated his suspension from the Medicare program. The Government filed a counterclaim against Dr. Peterson and a third party complaint against James Peterson for submission of false claims. A criminal indictment was also returned against the Peterson brothers which resulted in the conviction of both on one count of conspiracy, and of James Peterson on 39 substantive counts of submission of false claims (representing 39 of the 120 claims in the instant suit). On appeal this Court affirmed the conviction of James Peterson on the substantive counts and reversed the conviction of both Petersons on the conspiracy count.[4]

[4] See note 3 *supra*. The Court found that the jury lacked sufficient evidence to find Dr. Peterson guilty of conspiracy; reversing his conviction removed James Peterson's confederate, so the latter's conviction for conspiracy was also reversed.

Upon the trial of Dr. Peterson's complaint and the Government's counterclaim and third party claim, the district court found that Dr. Peterson was entitled to neither injunctive relief, nor tort or breach of contract damages against any of the defendants, and dismissed his complaint. The major portion of the trial was then devoted to the Government's claims. The court found that the Peterson brothers had violated the False Claims Act, 31 U.S.C.A. § 231, by knowingly submitting to the Government 120 false claims totaling $16,153.44, and thereupon entered a joint and several judgment for $31,606.72 representing double damages, together with the sum of $100,000 representing a $2,000 forfeiture for 50 of the 120 claims in question, with interest awarded from the date of judgment.

Dr. Peterson's Tort Claims

We first turn to Dr. Peterson's prayer for compensatory and punitive damages for the alleged tortious conduct of the defendants. He asserts that the Government and the individual defendants conspired to destroy him and to make it impossible for him to practice as a physician, and that the defendants took his property without due process, and wrongfully and maliciously interfered with his contractual rights. To support these charges, Dr. Peterson argues that he was wrongfully suspended from the Medicare program without notice or a hearing by employees of the Bureau of Health Insurance, H.E.W., who had no authority to impose sanctions, and that this was accomplished as a part of a conspiracy with the Government. Further, he complains that he was required to respond to criminal indictments and defend himself in a

criminal trial as well as defend against the Government's counterclaim for liability under the False Claims Act in the instant suit.[5]

[1] We have combed the record to find some basis for the numerous claims of tortious conduct on the part of the defendants and can find no evidence to support any of them. Evidence of a conspiracy between the Government and the individual and corporate defendants is non-existent. The suspension of Dr. Peterson and the withholding of payments due him by H.E.W. employees were actions both appropriate and necessary under instructions requiring the immediate suspension of any doctor participating in the Medicare program upon the discovery of possible fraud in the submission of claims under the Act. Bureau of Health Insurance Identical Memorandum No. 176, June 11, 1969. There is not a scintilla of evidence that the actions taken by the Bureau of Health Insurance employees were prompted by any reason other than to protect the integrity of the program. The corporate defendants, as fiscal intermediaries, did no more than act on the instructions received by them. This they were required to do. Convinced, as we are, that Dr. Peterson caused false claims to be made, we agree with the district court that the conduct of the defendants was neither malicious, negligent, nor unreasonable in the circumstances.

[2] Finally, we are unpersuaded that Dr. Peterson's property was taken without due process. His argument, premised

[5] Dr. Peterson has conceded that the Government is not liable under the Federal Tort Claims Act for malicious prosecution and interference with contract rights. See 28 U.S.C.A. § 2680(h).

upon Goldberg v. Kelly, 1970, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed. 2d 287, is that H.E.W. was not entitled without a hearing to withhold funds due him under Medicare as an offset against false claims then under investigation.

We note that the district court, by preliminary injunction, ordered the withheld funds paid to Dr. Peterson upon his posting of a bond to indemnify the Government should the claims indeed prove false. This was accomplished. Since the funds were no longer held by the Government, this removes this case from the parameters of *Goldberg*. In any event, Dr. Peterson's argument is laid to rest by our decision in Hilburn v. Butz, 5 Cir. 1972, 463 F. 2d 1207. There, the Hilburn family were concededly owed money under various Department of Agriculture programs. After an investigation, the Secretary administratively determined that the Hilburns had been overpaid under the same programs in previous years and that the monies presently owed them should be applied to offset such overpayments. We held that the Secretary had the right to withhold current funds equal to the overpaid funds, at least until the issues relating to the overpayments were judicially determined. Judge Clark, reasoning in a manner eminently appropriate to this case, held *Goldberg* inapplicable saying:

> The result in Goldberg v. Kelly was based on a judicial notice of the fact that welfare recipients as a class would be deprived of their very means of existence while awaiting the outcome of a post-termination hearing. In turn, those recipients' necessary search for daily subsistence would adversely affect their ability to seek redress from the welfare bureaucracy. No evidence of any such dire consequences was adduced in this case. Hilburn v. Butz, 463 F. 2d at 1209.

We conclude that there was no denial of due process, and that Dr. Peterson wholly failed to prove tortious conduct on the part of any of the defendants; the district court properly entered judgment in their favor.

Immunity from Liability

The defendants urged the district court to dismiss Dr. Peterson's amended complaint for tort liability on the ground of official immunity. The court declined to do so at that stage of the proceedings, but, after hearing all of the evidence, concluded that their claim of immunity was well taken. We agree.

[3, 4] With respect to defendants, Secretary of H.E.W. and the United States of America, there can be no question that this was an unconsented suit against the sovereign over which the court lacked jurisdiction. The individual defendants were all employees of the Bureau of Health Insurance, Department of Health, Education and Welfare. McSteen was the Regional Representative responsible for the administration of the Medicare program in five states, including Texas. Adams supervised all of the work on fraud and abuse cases, including Dr. Peterson's case. Gruninger was a program integrity specialist whose responsibility it was to investigate claims of fraud and abuse and forward them for prosecution where indicated. Chancellor was also on the program integrity staff of the Dallas, Texas, regional office. He had the responsibility of contacting the families of beneficiaries who had been billed for services by Dr. Peterson. Dr. Peterson's case was processed and investigated in precisely the same manner as

other suspected fraud cases. His suspension was effected as required by Bureau of Health Insurance Identical Memorandum No. 176, June 11, 1969.[6] Peterson's argument that the individual defendants were guilty of gross negligence in improperly imposing sanctions on the wrong person, without just cause, in conspiracy with one another and with the Government, and outside the scope of their employment, is wholly unfounded. There is not the slightest indication that any of the individual defendants acted outside of their line of duty or the scope of their employment in carrying out their official responsibilities.

We find equally without merit Dr. Peterson's contention that the individual defendants were lower echelon employees who are not entitled to claim immunity. In the seminal case of Barr v. Matteo, the Supreme Court reasoned that:

> The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. (footnote omitted.) . . . It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," Spaulding v. Vilas, *supra*, 161 U.S. [483,] at 498, [16 S.Ct. [631,] at page 637], 40 L. Ed. 780—

[6] The Memorandum provides in pertinent part: "Where cases of potential fraud are uncovered, the carrier should be instructed by the R.O. [Regional Office] to withhold payments in all pending assigned claims from the 'suspect' until the investigation is completed and conclusion reached as to whether fraud was perpetrated and, if so, what further action is to be taken."

> which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. (1959), 360 U.S. 564, 573—574, 79 S.Ct. 1335, 1340—1341, 3 L. Ed. 2d 1434.

Pared of distracting shadow contentions, the acts complained of were

> the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability.

Norton v. McShane, 5 Cir. 1964, 332 F. 2d 855, 859, citing with approval Ove Gustavsson Contracting Co. v. Floete, 2 Cir. 1962, 299 F. 2d 655, cert. denied, 374 U.S. 827, S.Ct. 1862, 10 L. Ed. 2d 1050. *See also* Scheuer v. Rhodes, 1974, 416 U.S. 232, 94 S.Ct. 1683, 40 L. Ed. 2d 90; Chafin v. Pratt, 5 Cir. 1966, 358 F. 2d 349. The alleged tortious acts were committed by agents of the Government responsible for the integrity of the Medicare program during the course of an investigation of purported violations of the Medicare Act; all the agents were shielded by immunity. Waymire v. Deneve, 5 Cir. 1964, 333 F. 2d 149.

[5] We need not tarry long with respect to the asserted tort liability and the immunity of the corporate defendants. They are Medicare fiscal intermediaries who act as agents at the sole direction of the Secretary of Health, Education and Welfare pursuant to 42 U.S.C.A. §§ 1395h and 1395u.[7] In

[7] Under regulations promulgated by the Department it is provided that "In the performance of their contractual undertakings, the carriers act on behalf of the Secretary, carrying on for him the administrative responsibilities imposed by the law. The Secretary, however, is the real party in interest in the administration of the program. . . ." 20 C.F.R. § 405.670 (1973).

this situation the United States is the real party in interest. Under the doctrine of sovereign immunity, the district court lacked jurisdiction over all these defendants, both governmental and private as agents of the Government. *CF.* Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co., 1973, 158 U.S.App.D.C. 294 485 F. 2d 1073; Johnson v. Johnson, E.D. Pa. 1971, 332 F. Supp. 510; Kuenstler v Occidental Life Insurance Company, C.D. Cal. 1968, 392 F. Supp. 532.

Government's Counterclaim and Third Party Complaint

[6] By its counterclaim and third party complaint, the Government sought recovery against the Peterson brothers under the False Claims Act, 31 U.S.C.A. § 231. As a common defense they urge that the Act was not violated because the physical therapy services were performed by qualified people, the patients receiving these services were entitled to them under Medicare, there was no financial loss to the Government, and the monies paid by the Government were therefore a liability which the Government was statutorily obligated to pay. This argument is unsound.

The claim forms here involved contain a place for the signature of physician or supplier, and the statement "(A physician's signature certifies that physician's services were personally rendered by him or under his personal direction)." Each claim submitted bore Dr. Peterson's purported signature (written by Morton) certifying something that simply was not so: Dr. Peterson did not personally render the service, nor was it rendered under his personal supervision. The services were rendered by Zodiac who was not a certified provider. It

could not have been paid, had it submitted a bill to Blue Cross. Furthermore, it is abundantly clear that Dr. Peterson was not the medical director of Zodiac, nor had he any supervision over the physical therapist who actually rendered the services. In short, the services billed were plainly not "covered" services, and the Government thus paid on the basis of the false claims presented.

As a further common defense, the Petersons argue that there is no statutory or regulatory requirement for the physician's certification; thus, they contend, the certification is not material to the claim, so no liability can attach to a false certification. This contention is without merit. It is, of course, true that the statute does not prescribed the type of claim form required, but it does provide that under Part B the services must be performed by a physician or as an incident to a physician's service. It was entirely reasonable and necessary for the Government to require such a certification on the claim forms to implement the Act, and at the same time protect public funds. Obviously, a false certification on the claim form frustrated the Government's attempt to process only valid claims and led to the payment for services which were not covered or payable under the Act.

[7] James Peterson next argues that "there is no delineation as to whether the court found a 'false' statement or a 'fraudulent' statement. Further, there is no distinction as to the falsity or the fraudulence of the 'claim,' or whether there was a 'claim.'" This is a futile exercise in semantics. A claim is within the purview of the False Claims Act if it is

grounded in fraud which might result in financial loss to the Government. Simply stated:

> This remedial statute reaches beyond "claims" which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. United States v. Neifert-White Co., 1968, 390 U.S. 228, 88 S.Ct. 959, 962, 19 L. Ed. 2d 1061.

The inclusiveness of the statute was spelled out in United States ex rel. Marcus v. Hess, 1943, 317 U.S. 537, 63 S.Ct. 379, 87 L. Ed. 443.

> These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government 317 U.S. at 544-545, 63 S.Ct. at 384.

[8] Finally, James Peterson faults the Government for failing to bear its burden of proving *scienter;* he claims the evidence did not demonstrate his personal knowledge and participation in the false certification of the claims. In restating the applicable test, we said in United States v. Aerodex, Inc., 5 Cir. 1972, 469 F. 2d 1003.

> The law is settled in this Circuit that to show a violation of the False Claims Act the evidence must demonstrate "guilty knowledge of a purpose on the part of [the defendant] to cheat the Government," United States v. Priola, 272 F. 2d 589, 594 (5th Cir. 1959), or "knowledge or guilty intent," United States v. Ridglea State Bank, 357 F. 2d 495, 498 (5th Cir. 1966). *See also* Henry v. United States, 424 F. 2d 677 (5th Cir. 1970). 469 F. 2d at 1007.

James Peterson insists that he did not instruct Morton to

sign Dr. Peterson's name to the forms but simply told her "to get them out as soon as possible." It was Dr. Peterson's responsibility, so James Peterson contends, to prepare and sign the forms as Medical Director of Zodiac, but the preparation of the forms was done by Concord personnel as a convenience because the records were kept there. We are convinced, however, that the record fully supports the district court's finding that Morton signed Dr. Peterson's name and provider number and James Peterson's post office box number to the claims at the direction of James Peterson. We are equally convinced, for the reasons we have previously stated, that Dr. Peterson was not the medical director of Zodiac and that this was a title trumped up in an effort to circumvent the requirements of the Act. There was ample evidence to conclude that James Peterson had knowledge or guilty intent to make false claims against the Government.[8]

We have considered the additional attacks made by James Peterson on the findings of fact. They raise immaterial discrepancies that cannot be parlayed into a reversal. The findings are not clearly erroneous. McAllister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. On the contrary, they have substantial support in the record. The

[8] On almost parallel evidence James Peterson was convicted on 39 counts under 18 U.S.C.A. § 1001 of the substantive offenses of unlawfully and knowingly making false statements of material facts to a government agency. This Court held that the overwhelming evidence established that Dr. Peterson did not in fact supervise the administering of physical therapy to any particular Zodiac patients, and that the evidence was sufficient to support the jury's finding that James Peterson had made willful misrepresentations on the claim forms filed with Group Medical and Surgical Service. United States v. Peterson, 5 Cir. 1974, 488 F.2d 645.

other errors asserted by James Peterson do not merit discussion.

Dr. Donald Peterson argues (in addition to the common defenses raised with his brother) that he is not personally liable under the False Claims Act because he had neither the intent to cause a financial loss to the Government nor the knowledge that the claims submitted by James Peterson contained a false or fraudulent statement. To support his argument, Dr. Peterson points out that he served as the medical director for Zodiac for the first six months of 1968. He knew the checks he received were for physical therapy services rendered by Zodiac at Concord and therefore thought this money belonged to Zodiac. He paid the money to Zodiac in good faith, knowing nothing about the contents of the claims filed. If this were the end of the story, Dr. Peterson would surely not be liable under the Act. But the parlous journey he began does not come to an end so quickly.

Not later than the first week in May of 1969, Dr. Peterson received from Group Medical and Surgical Service 120 individual checks made out to him totaling $15,803.36. Of these, 110 checks were dated April 28, 1969, and 10 checks were dated either May 1 or 2, 1969. Attached to each check was an "Explanation of Medicare" which set forth the name of the patient, that the services were provided by D. M. Peterson, D.O., his unique identifying number, the date and amount of the charge submitted, the amount allowed, the fact that the funds were assigned to the doctor, and the total amount of the Medicare payment. This "Explanation" and the accompany-

ing check, made payable to D. M. Peterson, D.O., were sent to Dr. Peterson at his correct address in Dallas, Texas. For some reason, left unexplained in the record, the checks were not deposited until June 9, 1969, over a month after their receipt. In the meantime, however, on June 3, 1969, six days before depositing the 120 checks, Dr. Peterson sent to James Peterson his personal check made to Zodiac.

[9] We reiterate that the district court was fully justified in finding that Dr. Peterson was not the medical director of Zodiac. He had no basis for assuming that the checks were sent to him because he was the medical director of Zodiac. On the contrary, the Medicare Explanation accompanying each check indicated that the claim was being paid to him personally and that the services were provided by him, under his unique identifying number, when in fact they were not. Under the circumstances, we agree with the district court that the act of Dr. Peterson in endorsing the checks and depositing them with the knowledge that he was not entitled to the proceeds was for the purpose of aiding James Peterson in obtaining payment and constitutes the making of a false claim as to each check. By this maneuver James Peterson and Zodiac ended up obtaining Government funds to which they were not entitled. The payment of the 120 claims would never have been questioned except for the complaints of patients who had never heard of Dr. Peterson.

Other Errors Asserted by Dr. Peterson

[10] Dr. Peterson complains that the district court erred in refusing to enter judgment for him for the sums, plus inter-

est, due him that were withheld during his suspension from the Medicare program. This issue is no longer viable. The district court granted a preliminary injunction in favor of Dr. Peterson, ordering that the Government pay him all sums due on claims which had been filed, and conditioned upon his posting a bond to secure the amount of any set-off that might ultimately be due the Government on its counterclaim. The bond was posted and Dr. Peterson received his money. Dr. Peterson is not entitled to interest for the period that the sums were withheld. "It is well established that the United States is not liable for interest in the absence of a contractual or statutory requirement to pay interest." United States v. Delaware Tribe of Indians, 170, 427 F.2d 1218, 1222, 192 Ct.Cl. 385. There is not statutory provision for the payment of interest under 42 U.S.C.A. § 1395, 28 U.S.C.A. § 1331, or 28 U.S.C.A. § 1361.

[11, 12] Next, Dr. Peterson argues that he was denied a fair trial because the court changed the order of proof, unduly limited his time for presenting his case, and acted as trial attorney for the Government. These charges border on the frivolous. The district court properly required that liability be established before proof of damages was offered, and it was within the court's discretion, which was soundly exercised, to initially try the issues raised by the counterclaim. Each witness offered on that phase of the case was, however, subjected to examination and cross-examination, without time limitation, in support of Dr. Peterson's claims of tortious conduct. Finally, the record is devoid of the slightest sugges-

tion that the court was an advocate for the Government. Moreover, these and other evidentiary errors asserted by Dr. Peterson were not the subject of objection below and cannot be raised for the first time on appeal. D. H. Overmyer Co. v. Loflin, 5 Cir. 1971, 440 F.2d 1213.

Dr. Peterson's contention that he was denied due process in connection with the suspension of his Medicare payments is unfounded. There is no administrative procedure prescribed by statute or regulation for suspension of Medicare recipients suspected of fraud. They, of course, have recourse to the courts for review of the action taken. Aquavella v. Richardson, 2 Cir. 1971, 437 F.2d 397. Here Dr. Peterson received a full hearing on the Government's claim of fraud.

Without further extending this opinion is is sufficient to say that we have carefully considered the various other issues raised by Dr. Peterson and find them meritless.

The Government's Asserted Errors

[13, 14] The Government urges that the district court erred in refusing to award interest on the fraudulent claims from the date the payment was made to the Petersons. We disagree. We subscribe to the view that since double damages, plus a specified sum, was provided in the False Claims Act for the purpose of making sure that the Government would be made completely whole, it is error to assess prejudgment interest on the recoverable amount. United States v. Foster Wheeler Corp., 2 Cir. 1791, 447 F.2d 100.

[15, 16] Finally, the Government argues that since the

district court found that 120 false claims had been filed, it should have assessed a $2,000 forfeiture for each false claim, or a total of $240,000, as provided in 31 U.S.C.A. § 231, instead of limiting the forfeiture to 50 claims totaling $100,000. The short answer is that the Government did not file a cross-appeal and may not now be heard to complain of the judgment entered below. In any event, the Government tacitly admits that the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government. The forfeiture should reflect a fair ratio to damages to insure that the Government completely recoups its losses. United States v. Hess, *supra;* Toepleman v. United States, 4 Cir. 1959, 263 F.2d 697. The district court used sound discretion in the imposition of forfeiture in this case.

We are satisfied that the issues were fully and fairly tried. The findings of fact have substantial support in the record are are not clearly erroneous. Proper legal conclusions were reached by the district court. Finding no error the judgment is

Affirmed.

EXHIBIT C

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Eugene PETERSON and Donald M. Peterson, Defendants-Appellants.

No. 73-1748.

United States Courts of Appeals,
Fifth Circuit.

Jan. 18, 1974.

Rehearing Denied Feb. 19 and March 29, 1974.

Prosecution of two defendants, a physician and a nonphysician, for unlawfully and knowingly making false statements of material facts to a government agency, and for conspiracy, in connection with claims for payment for physical therapy services rendered. In the United States District Court for the Northern District of Texas at Dallas, Sarah Tilghman Hughes, J., the nonphysician was convicted of substantive offenses and of conspiracy, and the physician was convicted only of conspiracy. They appealed. The Court of Appeals, Gewin, Circuit Judge, held that, in view of overwhelming evidence that the doctor did not in fact supervise the rendition of physical therapy services, evidence which might have raised a doubt as to whether the physician was required to be personally present when the services were rendered, to meet a requirement of personal supervision, was properly excluded. The Court also held, however, that evidence was

insufficient to sustain the conspiracy conviction of the physician, whose signature on the claim forms had been forged.

Affirmed in part; reversed and remanded with instructions to dismiss conspiracy count of indictment.

GEWIN, Circuit Judge:

This appeal is taken from a judgment of conviction entered against Dr. Donald Peterson for conspiring to defraud an agency of the United States Government, in violation of 18 U.S.C. § 371 (1970).[1] His brother and alleged co-conspirator, James E. Peterson, also before us on appeal, was convicted under the conspiracy charge and on a number of counts under 18 U.S.C. § 1001 (1970)[2] alleging the substantive offenses of unlawfully and knowingly making false statements of material facts to a government agency. They were tried jointly before a jury which found them guilty. The prevarication is designated as the allegedly false certification that physical therapy rendered to patients at an extended care facility was provided by Dr. Peterson or under his personal auspices. Both appellants claim that numerous evidentiary errors were committed below and challenge the sufficiency of the evidence to support the jury's verdict. Finding these contentions to be of only limited efficacy, we reverse the conspiracy convictions but affirm James E. Peterson's conviction of the substantive offenses.

I

Before addressing the issues raised on appeal, it is instructive to consider the complicated statutory and factual back-

ground which gave rise to the instant prosecutions. James E. Peterson is the owner of Concord Manor, a nursing home approved by the Social Security Administration as an extended care facility and hence qualified to receive payment for hospital benefits rendered to the aged under Title XVIII, Health Insurance for the Aged of the Social Security Act, popularly denominated the Medicare Act.[3] The Act prescribes a bifurcated scheme of remuneration to those extending aid to the elderly. Under Part A, an extended care facility making outlays for room and board and nursing services may be compensated on a per diem rate determined by agreement with its fiscal intermediary, here Mutual of Omaha.[4] Under Part B, doctors rendering physical therapy are remunerated directly by a second fiscal intermediary, here the Group Medical and Surgical Service (Blue Cross-Blue Shield). Prior to July 1, 1968, Part B. claims were required to be filed by a physician on government Form SSA-1490(2), and could not be filed by a nursing home or medical organization comprised of physical therapists.[5] The 1968 amendment, however, altered this filing and compensation procedure by enabling a group of therapists, who form an organization to provide physical therapy and enter into agreements with extended care facilities to render the therapy prescribed by a patient's doctor, to bill directly for their services. It was this amendment which spurred the organization of Zodiac, Inc. by James Peterson and the fraternal interplay between James and Dr. Peterson. At his brother's behest Dr. Peterson enlisted as medical advisor to Zodiac, responsible for drafting procedures which would enable it to qualify as a "provider of services." Upon such

qualification, Zodiac would be entitled, under the new amendment, to bill directly for costs incurred in administering physical therapy to Medicare patients.

We turn now to the occurrences which gave rise to the institution of criminal proceedings against the two defendants. During the first six months of 1968, Zodiac furnished physical therapy to patients at Concord Manor. This therapy was administered by a registered physical therapist and two therapy aides. Dr. Peterson's involvement was purportedly confined to drafting procedures for submission to the Social Security agency, pursuant to the new amendment. Nevertheless, in 1969, Group Medical and Surgical Service received requests under his name for payment of medical insurance benefits for Zodiac patients receiving physical therapy from January to June 1968. These requests were submitted on Form SSA-1490D(2), alluded to above, which in box # 14, required that the administering doctor, here Dr. Peterson, certify that he either supplied the services or had them provided under his personal direction.[6] The forms received contained Dr. Peterson's signature, subsequently learned to have been forged, his personal supplier number, and a post office box address substituted for Dr. Peterson's registered address. The change of address was intended to divert the checks from Dr. Peterson's address to that of Zodiac. This was an abortive effort because Dr. Peterson's supplier number and address were unique to him and payment would be sent to Dr. Peterson automatically notwithstanding the change of address. Ignorant of the forgery and disregarding, as required, the substituted address, Group Medical and Surgical Service remitted claims

payments to Dr. Peterson, who after depositing them in his Dallas Clinic Account, upon the same day he received them, drew a new check for the same amount payable to the order of Zodiac. Both convictions stem from the conduct engaged in with respect to the filing of the claims.

II

The fraternal bond, welded by the joint employment of Dr. James Peterson in the Zodiac endeavors, appears to have been dissipated by the advancement of divergent theories for upsetting their convictions. The only semblance of unity retained throughout this appeal is that both claim that the prosecutors and the jury made "much ado about nothing." The premise underlying James Peterson's claim is that his brother was sufficiently involved in the operations of Zodiac affairs to dispel any inference that he, James Peterson, perpetrated a fraud in filing the claims. Conversely, the premise underlying Dr. Peterson's claim is that the evidence of his involvement in Zodiac affairs and the filing of claims is so meagre that he could not be found to have participated in the conspiracy. We consider their precise contentions advanced seriatim.

[1-4] James Peterson raises four contentions on appeal, each of which is devoid of merit. The first is that the lower court erred in excluding certain documents relating to Zodiac's qualification as a provider of services and two prior indictments which were dismissed. Second, the government's suppression of a letter from HEW addressed to Zodiac warranted reversal under Brady v. Maryland, 373 U.S. 83, 83 S.Ct.

1194, 10 L. Ed. 2d 215 (1963). And third, the lower court erred in failing to give requested charges and instructions which would have clarified the meaning of the phrase "under his personal direction." Each of these contentions fails, the first because under F.R.Cr.Proc. 26, it was within the district court's discretion to exclude the proffered evidence and such discretion was not abused in the instant case, *see* United States v. Twilligear, 460 F. 2d 79, 81 (10th Cir. 1972); United States v. Skillman, 442 F. 2d 542, 551 (8th Cir.) cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L. Ed. 2d 63 (1971), the second, because James Peterson's characterization of the government's action with respect to the HEW letter as suppression is illusory, and the third, because the trial judge's instructions encompassed the substance of what James Peterson desired to have the court propound to the jury. A more formidable impediment to the efficacy of these evidentiary arguments is that the excluded evidence would be germane only if the theory upon which his defense is predicated were viable. This theory is that the meaning of the terminology "under his personal direction" contained in box 14 of Form SSA-140D(2) was ambiguous and hence any misrepresentation in filing the claims for payment was attributable to inadvertence and not to willfulness. The excluded evidence arguably gave credence to the view that some ambiguity prevailed.[7] However, whatever force his theory has derives largely from its generality, for the overwhelming evidence established that Dr. Peterson did not in fact supervise the administering of physical therapy to any particluar Zodiac patients. The inefficacy of his theory invariably condemns James Peterson's fourth

challenge, raised below through a motion for judgment of acquittal, and pressed here that the evidence was insufficient to support the jury's finding that he had made willful misrepresentations on the claim forms filed with Group Medical and Surgical Service. Evidence of Dr. Peterson's non-involvement in administering physical therapy clearly supports the jury's finding in this regard. Thus, James Peterson's conviction on the substantive counts must stand.

Dr. Peterson objects on appeal to two evidentiary rulings[8] and the sufficiency of the evidence to support the jury's finding that he participated in a conspiracy to defraud the government. He had raised this sufficiency objection in the district court by means of a motion for judgment of acquittal when the government rested its case, again when James Peterson rested his defense and reiterated it when all parties had closed their testimony by way of an objection to the submission of the case under the district court's charge. We confine our resolution to the sufficiency grounds.

Under established judicial precedent, a jury verdict must be sustained if there is substantial evidence when viewed in a light most propitious to the government, to support it. *See* Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L. Ed. 680 (1942); United States v. Hernandez, 484 F. 2d 86, 87 (5th Cir. 1973); United States v. Arroyave, 477 F. 2d 157, 163 (5th Cir. 1973); Lacaze v. United States, 391 F. 2d 516, 519 (5th Cir. 1968). This rule, while dictating that deference be extended to jury findings, does not immunize them from attack. An examination of the evidence convinces

us that Dr. Peterson's challenge is well-founded.

[5] In reviewing the evidence marshalled by the government in support of the conspiracy charge, it is critical to note that conduct of Dr. Peterson subsequent to the time that claims were filed with Group Medical and Surgical Service is germane only to the extent that such conduct supports the inference that he had planned with James Peterson to file the claims containing the misrepresentation. Since the conspiracy had run its course *eo instante* upon the filing of these claims, Dr. Peterson's conduct upon receipt of checks in payment of claims could not constitute an overt act in its furtherance.[9] *See* Bollenbach v. United States, 326 U.S. 607, 611, 66 S. Ct. 402, 404, 90 L. Ed. 350, 353 (1946).

[6] The record is devoid of evidence, prior to Dr. Peterson's receipt of claims checks from Group Medical, which supports the conclusion that he had engaged in the alleged conspiracy.[10] Dr. Peterson steadfastly adhered to the position that he never directed the administering of physical therapy to Medicare patients and that he was ignorant of the forgery of his signature on Form SSA-140D(2). His testimony was corroborated by Helen Maeker, the registered physical therapist, and Lucille Morton, the secretary who at James Peterson's behest, forged Dr. Peterson's signature and attempted to substitute a post office box number for Dr. Peterson's registered address listed on the claims form.[11] Moreover, it is uncontroverted that Dr. Peterson expressly disavowed any intention to bill for services performed by Zodiac during his abbreviated affiliation and that he severed relations with Zodiac

after July 1, 1968, a substantial period of time before March 1, 1969, the date the alleged conspiracy transpired. Finally, there is no evidence that he saw, much less conversed with James Peterson after his disaffiliation, other than upon the day the claims checks were remitted to him. Hence, the jury verdict can only be sustained if Dr. Peterson's conduct upon receiving the checks supports the inference that he had pre-ordained the false filing engineered by James Peterson.

The evidence adduced by the government at trial established that upon receipt of payment checks from Group Medical totaling $18,000, Dr. Peterson reported their arrival to his brother, deposited them in his clinic account, personally wrote a new check designated accounts payable to Zodiac for the entire amount and delivered it to Zodiac on the very same day.[12] Dr. Peterson admitted that he took this action without making any attempt to contact Group Medical and Surgical Service about the checks and despite the fact that he knew the claims did not involve any of his own patients and that he had not authorized submission of the claims in his own name. The government also attributed significance to testimony elicited on cross-examination of Dr. Peterson which in allegedly impugning his credibility, reflected upon the mendacity of his assertions of noninvolvement in the claims filed.[13]

The countervailing evidence and that which compels the conclusion that the jury's inference of conspiracy must be set aside revolves around the actions of the alleged confederate, James Peterson. His conduct, in forging his brother's

signature, in supplying his supplier number, and in altering his registered address on the claims filed with Group Medical reflects a protracted effort to divert the checks from Dr. Peterson. Such an effort would appear to be inexplicable if Dr. Peterson were involved in the scheme. In short, Dr. Peterson's conduct appears to be more pickwickian than conspiratorial.

Moreover, we cannot overlook the fact that Dr. Peterson was exonerated of the charges contained in the 39 substantive counts of the indictment. Concededly, a conspiracy to commit a crime is a separate and distinct crime from the substantive offense. *See* Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L. Ed. 2d 312, 317 rehearing denied, 365 U.S. 825, 81 S.Ct. 687, 5 L. Ed. 2d 703 (1961); United States v. Jasso, 442 F. 2d 1054, 1056 (5th Cir.), cert. denied, 404 U.S. 845, 92 S.Ct. 146, 30 L. Ed. 2d 81 (1971); Downing v. United States, 348 F. 2d 594, 600 (5th Cir.), cert. denied, 382 U.S. 901, 86 S.Ct. 235, 15 L. Ed. 2d 155 (1965). But this distinction may become tenuous where, after receiving an "aiding or abetting" charge, a jury exonerates a defendant on the substantive count the elements of which closely approximate, if not parallel, the overt acts alleged in the conspiracy charge. We do not mean to suggest that were additional evidence of conspiracy adduced at trial a jury verdict of guilty on the conspiracy count alone would invariably require reversal. Rather, based on the unique facts presented in the record, it is difficult to conceive of how the jury could exculpate Dr. Peterson as an aider or abettor but yet inculpate him as a confederate.

III

[7, 8] For the aforementioned reasons, we hold that the jury lacked sufficient evidence to find Dr. Peterson guilty of conspiracy to defraud an agency of the United States Government. Concomitantly, since this absolution removes James Peterson's confederate, his conviction on the conspiracy charge must also be reversed. Since neither appellant joined a motion for a new trial with their motions for judgment of acquittal, the appropriate disposition is to reverse and remand with directions that the indictments be dismissed as to the conspiracy counts.[14] *See* United States v. Apollo, 476 F. 2d 156, 158 n. 1 (5th Cir. 1973); United States v. Musquiz, 445 F. 2d 963, 966 (5th Cir. 1971); 2 Wright, Federal Practice & Procedure § 470 (Supp. 1973). Since we discern no infirmity in James Peterson's conviction on the substantive counts, we affirm as to that part of the judgment of conviction.

Affirmed in part; reversed and remanded with instructions to dismiss the conspiracy count of the indictment.

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[14] **Even if the record disclosed a motion for a new trial our conclusion would not be altered. The record convinces us that the Government has been given a full and fair opportunity to present all the evidence available on the conspiracy charge. The facts have been fully developed and no useful purpose would be served by another conspiracy trial.**

EXHIBIT D

UNITED STATES CONSTITUTION AMENDMENTS FIVE and EIGHT

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FEDERAL STATUTES

28 § 286. Conspiracy to defraud the Government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

June 25, 1948, c. 645, 62 Stat. 698.

28 § 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officers in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 698.

28 § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

June 25, 1948, c. 645, 62 Stat. 701.

28 § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any

false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

False Claims Act, 31 U.S.C. § 231[1]

[1]Relevant portions of this Act are:

"Any person . . . who shall make or cause to be made or present or cause to be presented, for payment or approval . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . . shall forfeit $2,000.00, and addition, double the amount of damages which the United States may have sustained by reason of the doing, or committing such act . . ."

42 § 1395(a). Free choice by patient guaranteed

Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter in such institution, agency, or person undertakes to provide him such services.

42 § 1395g. Payment to providers of services

The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it, and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) and prior to audit or settlement by the General Accounting Office, from the Federal Hospital Insurance Trust Fund, the amounts so determined, with necessary adjustments on account of previously made overpayments or under-payments; except that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider under this part for the period with respect to which the amounts are being paid or any prior period.

Aug. 14, 1935, c. 531, Title XVIII, § 1815, as added July 30, 1965, Pub.L. 89-97, Title I, § 102(a), 79 Stat. 297.

42 § 1395nn. Offenses and penalties

(a) Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under this subchapter,

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) Whoever furnishes items or services to an individual for which payment is or may be made under this subchapter and who solicits, offers, or receives any—

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services,

shall be guilty of a misdemeanor and upon conviction thereof

shall be fined not more than $10,000 or imprisoned for not more than one years, or both.

(c) Whoever knowingly and willfully makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operation of any institution or facility in order that such institution or facility may qualify (either upon initial certification or upon recertification) as a hospital, skilled nursing facility, or home health agency (as those terms are defined in section 1395x of this title), shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $2,000 or imprisoned for not more than 6 months or both.

Aug. 14, 1935, c. 531, Title XVIII, § 1877, as added Oct. 30, 1972, Pub.L. 92-603, Title II, § 242(b), 86 Stat. 1419.

42 § 1396h. Offenses and penalties

(a) Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State plan approved under this subchapter,

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such

benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any—

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Whoever knowingly and willfully makes or causes to be made, or induces or seeks to induce the making of, any false statement or representation of a material fact with respect to the conditions or operation of any institution or facility in order that such institution or facility may qualify (either upon initial certification or upon recertification) as a hospital, skilled nursing facility, intermediate care facility, or home health agency (as those terms are employed in this subchapter) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

Aug. 14, 1935, c. 531, Title XIX, § 1909, as added and amended Oct .30, 1972, Pub.L. 92-603, Title II, §§ 242(c), 278(b)(9), 86 Stat. 1419, 1454.

SUMMARY OF FEDERAL PENAL STATUTES
APPLICABLE TO MEDICARE AND MEDICAID CLAIMS

U.S.C. Title	Section	Applied To Applnt	Charge	Maximum Fine and/or Imprisonment	
18	286	Yes	False, fictitious or fraudulent claims	$10,000	10 years, or both
18	287	Yes	Conspiracy to defraud the government with respect to claims	$10,000	5 years, or both
18	371	Yes	Conspiracy to commit offense or to defraud United States	$10,000	5 years, or both
18	1001	Yes	Statements or entries generally	$10,000	5 years, or both
31	231	Yes		$2,000 and double damages	
42	1395(nn)	No	Offences and penalties	$10,000	1 year, or both
42	1396(h)	No	Offences and penalties	$10,000	1 year, or both

EXHIBIT F

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk
March 27, 1975

TO ALL COUNSEL OF RECORD
Re: 74-1067 PETERSON v. WEINBERGER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
By Anne G. Parent, Deputy Clerk

cc: Mr. Glynn A. Pugh
Messrs. Joseph A. Jenkins
James W. DeMik
Mr. Jerry Jordan
U.S. Attorney's Office
Mr. Kenneth J. Mighell

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1442

DONALD M. PETERSON, PETITIONER

v.

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is a companion case to *Peterson* v. *Blue Cross/Blue Shield of Texas*, No. 74-1360, petition for a writ of certiorari filed April 30, 1975. Here petitioner contests the court of appeals' affirmance of a judgment in the government's favor, imposing civil liability on petitioner and his brother for the submission of false claims under the Medicare programs and rejecting petitioner's challenges to the actions of the government employees in investigating those claims. The underlying facts are set forth in our opposition in No. 74-1360. We briefly recapitulate here the history of the litigation.

In September 1971, petitioner brought suit in the United States District Court for the Northern District of Texas against the United States, the Attorney General,

the United States Attorney for the Northern District of Texas, the Secretary of Health, Education, and Welfare ("HEW"), several HEW employees, and certain companies involved in the administration of the Medicare program, seeking injunctive relief and damages for alleged breach of contract and tortious conduct in connection with HEW's suspension of payments to him under the Medicare program in December 1969 (Pet. App. A-1 to A-2).[1] The government counterclaimed against petitioner and filed a third-party complaint against James Peterson (petitioner's brother), seeking damages under the False Claims Act, 31 U.S.C. 231.

The district court denied petitioner relief and awarded statutory forfeitures and double damages to the government on its counterclaim and third-party complaint. The court of appeals affirmed, holding that petitioner had failed to prove either breach of contract or tortious conduct, that the defendants were officially immune from liability, and that petitioner and James Peterson had submitted false claims to the United States (Pet. App. B-1 to B-21; 508 F. 2d 45).

The 57-page petition presents an overlapping melange of numerous questions, none of which requires further review. We deal with each briefly.

1. Petitioner argues that imposition of double damages and 50 $2,000 civil forfeitures under the False Claims Act was unconstitutionally excessive (Pet. 23-25). But the civil liability imposed here—which was far less than the

---

[1]The district court entered a preliminary injunction ordering HEW to pay petitioner the funds due him, conditioned upon his payment of a bond (Pet. App. B-19).

statute authorized[2]—was reasonable in light of the facts, which revealed an elaborate scheme to bilk the government of medicare funds to which petitioner and his brother had no lawful claim.[3]

2. Petitioner contends that the False Claims Act is unconstitutional because it is part of a complex statutory scheme, imposes double jeopardy, and denies a person in his position due process by coercing him to plead guilty (Pet. 25-29). This Court, however, has held that the double jeopardy clause does not bar liability under the False Claims Act even where the defendant has previously been convicted and punished for the same violation. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-551. Not having been "coerced" to plead guilty, petitioner is in no position to complain that the statute might have that effect on others.

3. Petitioner asserts that his role in the fraudulent scheme was merely that of an agent and that he could not have violated the False Claims Act while acting in that capacity (Pet. 29-31, 40-41). But "[t]his remedial statute reaches * * * all fraudulent attempts to cause the Government to pay out sums of money" (*United States* v. *Neifert-White Co.*, 390 U.S. 228, 233), and the court of appeals properly concluded, on the facts of this

---

[2]Forfeitures were assessed on only 50 of 123 false claims. The judgment totalled $131,606, for which petitioner and his brother are jointly and severally liable (see Pet. App. A-15, B-21).

[3]Unlike *United States* v. *Bornstein*, No. 74-712, certiorari granted January 27, 1975, the petition presents no question concerning either the basis for determining the number of violations actually committed under the False Claims Act or the method of calculating double damages.

case, that petitioner had sufficiently associated himself with his brother's fraudulent scheme to justify the imposition of civil liability (Pet. App. B-13 to B-18).

4. Petitioner claims that the court of appeals' reversal of his criminal conviction for conspiracy to make false statements in violation of 18 U.S.C. 1001 precludes civil liability under the False Claims Act. The difference in the burdens of proof in criminal and civil cases, however, is itself sufficient to explain the difference in result. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234-235.

5. Petitioner's claim of conflict among the circuits concerning the "intent" or "scienter" required for civil liability under the False Claims Act (Pet. 35-37) is not properly presented in this case. The court of appeals here, following its prior decisions in *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (C.A. 5), and *United States* v. *Priola*, 272 F.2d 589, 594 (C.A. 5), construed the Act as requiring proof of a defendant's "guilty knowledge" and a "purpose * * * to cheat the Government * * *" (Pet. App. B-15).[4] To the extent that the circuits differ in framing the standard of liability, the one applied by the court of appeals here is recognized as being the most favorable to defendants. See, *e.g.*, *United States* v. *Cooperative Grain & Supply Co.*, 476 F.2d 47, 56-60 (C.A. 8). Since petitioner's liability would therefore have been upheld in any court of appeals, the alleged conflict has no bearing on the outcome of this case.

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[4]Petitioner's complaint that the court of appeals ignored *stare decisis* by not following its decision in *Priola* (Pet. 38-40) is without foundation, and would in any event not warrant this Court's intervention, particularly in view of petitioner's failure to seek rehearing *en banc*. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.

6. Petitioner's contention (Pet. 41-43) that he was denied a fair trial by the trial court's actions in ordering the proof and limiting the time for presentation of evidence, all without objection at trial, was correctly found by the court of appeals to be unsupported and "border-[ing] on the frivolous" (Pet. App. B-19 to B-20).[5]

7. In his complaint petitioner alleged that the respondents were liable to him in tort for HEW's suspension of payment to him on certain Medicare claims that have since been paid. Claiming that the suspension violated due process and the Administrative Procedure Act, petitioner contends that he was improperly denied (1) damages for respondents' allegedly tortious conduct in denying him a hearing, (2) interest on the payments initially withheld, and (3) unspecified injunctive relief (Pet. 43-47, 52-54).[6]

But both courts below correctly determined, on the basis of a full factual record, that all the respondents were carrying out official responsibilities in their capacities as government agents in suspending petitioner's payments and were, accordingly, immune from liability (Pet. App. A-5 to A-6, B-10 to B-13). That result accords

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[5]The court of appeals also properly found "meritless" (Pet. App. B-20) petitioner's claim that the trial court abused its discretion in disposing of his request for sanctions because of the asserted delinquencies of the government in pre-trial discovery (Pet. 47-48).

[6]As the court of appeals held (Pet. App. B-19), there is no statutory basis for an award of the pre-judgment interest petitioner seeks. Nor has petitioner shown that the denial of injunctive relief constituted an abuse of discretion.

with this Court's prior decisions articulating the scope of official immunity. See *Barr* v. *Matteo*, 360 U.S. 564; *Scheuer* v. *Rhodes*, 416 U.S. 232.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

---

[7]The decision below does not conflict with this Court's decision in *Wood* v. *Strickland*, No. 73-1285, decided February 25, 1975. Since HEW's suspension of payments to petitioner was instituted in December 1969, prior to the decision in *Goldberg* v. *Kelly*, 397 U.S. 254, upon which petitioner relies for his asserted right to a hearing, the failure to grant a hearing did not at the time contravene petitioner's "clearly established constitutional rights" (*Wood* v. *Strickland*, *supra*, slip op. at 14); nor was there in this case any proof of "impermissible motivation" (*ibid.*).

SUPREME COURT, U. S.

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1442

DONALD M. PETERSON,

Petitioner,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

This supplemental brief is Petitioner's response to arguments first raised in Respondent's brief responding to petition for certiorari.

1. For the first time in this case Respondents' Brief mentions the degrees as to burden of proof, as to criminal and civil cases, which has no application here in these companion cases. The basic facts are the same (Respondents' Brief in Case No. 74-1360, p. 2), and here in the instant case "scienter" is an essen-

tial element to fining Petitioner. The real effect of the second trial here is to supply additional evidence showing Petitioner (Dr. Peterson) was not associated with the wrongful act, namely, the filing of false claims.

The real injustice here arises from inconsistent factual conclusions, and thus conflicting results, arrived at by lower courts based on the same factual events. In the first appellate court decision, *U. S. v. Peterson* (CA 5, 1974) the court absolved Petitioner, after finding he was not associated with the wrongful act of conspiring to make a false statement, Exhibit C of Petition. In the instant case, however, *Peterson v. Weinberger* (CA 5, 1975) (Petitioner Ex. B) the Petitioner is fined for making false claims, though the appellate court fails to clearly conclude that "scienter" existed as to the Petitioner.

The conclusion was arrived at in the first decision that Dr. Peterson was not associated with making the claims, either as a participant or a co-conspirator. Such conclusion was based on a material fact, the very method used in preparing the claims, marking out Dr. Peterson's office address and inserting in lieu thereof the Irving, Texas post office box of the principal, James Peterson. Such a scheme indicates an intention to exclude therefrom the Petitioner. In the second case there is evidence establishing that Petitioner had no "scienter" of the filing of false claims, as he learned of the wrongful act some four weeks thereafter upon receipt of checks (Petition, 10).

Thus, the issue here is not one of burden of proof, as suggested by Respondents. But instead, it involves a selection of the proper factual evaluation. While one factual conclusion is

logical, (see explanation and conclusion in the appellate decision in the criminal case, Petition Ex. C), the conclusion here is inconsistent with the basic facts (see the incomplete, confusing analysis in the appellate court opinion, Petition Ex. B). Respondents' new contention is contrary to the record, and this is apparent from reading the record or opinions.

It is respectfully submitted to the Court, and is believed by Petitioner's counsel, that the inconsistent appellate court decision may be attributed to ulterior motives influencing this second decision of the court, resulting from certain actions of Petitioner's counsel. It is unjust to penalize Petitioner for any indiscretion of his counsel.

And as to joint and several liability and collection of judgment, the Dallas attorney for Justice has clearly advised Petitioner's counsel that enforcement will definitely be made first against Petitioner, at least for $85,000. Though according to court opinions Petitioner is neither principal, participant or conspirator in the wrongful act of filing false claims; nevertheless the collection is to be made from Petitioner, not the one principal and only beneficiary of this scheme, James Peterson, a person separate from Petitioner.

2. Respondents' brief for the first time proposes (Brief, 4), wrongfully, that the appellate court (CA 5) here follows its prior decisions *(U. S. v. Aerodex,* (CA 5, 1973) 469 F2d 1003 and *U. S. v. Priola* (CA 5, 1959) 272 F2d 589), which require "scienter" as an essential element of guilt under the False Claims Act. Like the *Priola* case, as to Petitioner no "scienter" was proven here, but contrary to *Priola* the Petitioner is fined here.

While "scienter" existed here (Petition Ex. B, pp. 15-17 of court opinion), its existence was found only as to the principal, James Peterson, and not the Petitioner.

Admittedly Petitioner was in no way associated with the filing of false claims (the wrongful act), as stated in the various opinions of the lower courts, particularly the appellate criminal case opinion (Petition, Ex. C). Rather, the evidence shows Petitioner knew not of the act of filing. Petitioner's only act was a separate act — writing of a check — on a date four weeks after the wrongful act. Thus, Petitioner is being fined, though as to him "scienter" of the wrongful act was not proven. This result is contrary to all earlier decisions of this circuit (CA 5).

It is error for the appellate court not to explain or justify in its opinion (Petition Ex. B) its inconsistency in not following its earlier decisions in *Aerodex* and *Priola* (Petition Issue No. 6, pp 5 & 6 and 38 & 39).

The Court should not be deceived by Respondents' erroneous evaluation of these decisions.

3. Respondents' assertion (Brief, 6.) of a "full factual record" is an irresponsible half-truth, designed to deceive the Court. In part, such a record exists, namely, as to any evidence desired to be submitted by the government and Third Party Defendant, but it is false as to Petitioner's defense in the False Claims Act case and the issues in the Plaintiff's case (Petition, 41-42).

4. Evaluating for the first time recent Supreme Court decisions, Respondents assert (Brief, 6.) that the lower court results here follow "prior decisions articulating the scope of official

immunity" and then proceed to misinterpret these decisions. The cited *Barr* case has either been reversed by subsequent cass or else limited in scope to government executives (Petition 48-52) whereas defendants here are (1) field investigators of HEW exercising illegally judicial and police powers in ordering the sanctions themselves, and (2) insurance companies acting wrongfully in obeying illegal instructions. The lower court here, like in the *Rhodes* case, erred in dismissing the tort actions without each defendant being required to prove up his personal defense. Defendants herein elected at the trial not to introduce any evidence as to their personal defenses. The appellate court decision (Petition Ex. B) placed the burden of proof, as to the defendants' personal defenses, upon Petitioner-Plaintiff.

Contrary to Respondents' evaluation, the Supreme Court decisions, such as *Bivens, Rhodes* and *Strickland,* have served to limit the scope of immunity for government employees. The lower courts should be required to follow these recent decisions. The *Barr* case, cited and relied on by the lower courts, is not controlling here, and the lower court decision should be reversed.

It is respectfully submitted that this Petition for Writ of Certiorari should be granted, the False Claims Act issues here are more significant than those in *U. S. v. Bornstein,* No. 74-712.

Glynn A. Pugh

GLYNN A. PUGH,
Attorney for Petitioner,
Donald M. Peterson

June 26, 1975

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OCT 28 1975
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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1442

DONALD M. PETERSON,

Petitioner,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING
Under Rule 58(2)

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PETITION FOR REHEARING
Under Rule 58(2)

Petitioner presents his Petition for a Rehearing of this Court's Order dated October 6, 1975, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Petitioner now petitions for a remand, a method of disposition of this case inconsistent with his original petition requesting a hearing by the Court on Constitutional and other legal issues. Further, this Petition for Rehearing is based on post-trial and recent events not reflected in the record. As the Petition for Writ of Certiorari has been denied, this case must now be remanded to the lower courts. The petition now requests a remand with special instructions, for both the Court of Appeals and the U.S. District Court.

It is proper for the Court to consider Petitioner's alternative not previously presented, *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50; 83 L.Ed. 34, 36. The Court may order a case remanded to lower courts for adjudication of subsequent developments. *White v. Regester* (June 30, 1975) ..... U.S. ....., 45 L.Ed.2d 662 and *Hill v. Printing Industries of the Gulf Coast* (June 30, 1975), ... U.S. .....; 45 L.Ed.2d 664.

The only Petitioner before the Court is Dr. Donald M. Peterson. The third party defendant, James E. Peterson and brother of Petitioner, did not contest the $131,607 liability against him under the False Claims Act. But Petitioner contends the courts erred in holding him also jointly and severally therefor, and that liability under the False Claims Act should be limited to the principal, James Peterson.

The lower court opinions in this case, and in a companion criminal case based on conspiracy/false statement charges, were reported as follows:

Date of CA 5 decision	*Style of case*	*Appellate court decision*
January, 1974	U.S. v. Peterson, 488 F2d 645.[1]	Charges were based on false statements/ conspiracy and CA5 concluded Dr. Peterson himself knew not about the filing of the claims, and thus was not guilty.
February, 1975	Peterson v. Weinberger, 508 F2d 45,[2] 370 F. Supp. 1259[3]	Charges were based on False Claims Act (FCA), and CA 5 based on the same facts adopted a contrary conclusion, namely that Dr. Peterson himself was also responsible for filing false claims, and this violated the FCA.

QUESTIONS PRESENTED

The two questions presented in this motion for rehearing are as follows:

1. Upon remand, should the Court of Appeals for the Fifth Circuit be ordered to follow in this case the holdings of its previous decision (which are inconsistent with the instant case holdings) or else, sitting in Banc, be directed to distinguish or reverse its previous decision?

2. Upon remand, should the Federal District Court be or-

[1] A copy of this opinion appears in the original petition as Exhibit C.

[2] A copy of this opinion appears in the original petition as Exhibit B.

[3] A copy of this opinion appears in the original petition as Exhibit A.

dered to direct a verdict favorable to Petitioner or grant him a new trial, as Petitioner was denied a fair trial, due *inter alia* to government's denial of discovery of the government case file?

MATERIAL FACTS

1. Inconsistent Decisions

Shortly after Dr. Peterson began this suit in September, 1971, for an injunction to stop abuse of his medical practice by HEW, for tort damages, and for collection of fees due him, Justice Department attorneys warned him to expect more harrassment if he refused to withdraw his suit. Justice advised an all-out effort would be made, to attribute to Dr. Peterson the $17,000 in wrongful claims filed by the physician's brother. Justice admitted the claims had not been filed by Dr. Peterson, but they adopted a game theory or litigation strategy: having no valid defense, their best position was an aggressive, overwhelming offense. Such an offense was launched, and pursued, despite their off-the-record admission that Dr. Peterson was not involved in filing the claims.

Three criminal indictments were brought against Dr. Peterson, charges based on several different statutes, 18 U.S.C., Sec. 286, 18 U.S.C. 287, 18 U.S.C. 371, and 18 U.S.C. 1001. Meanwhile, trial of the Petitioner's case was delayed. Then, in addition, charges were made in the instant case under 31 U.S.C., Sec. 231 (the False Claims Act), and James E. Peterson was joined as a party thereto. The final result of the three indictments is set forth in the Fifth Circuit Court of Appeals opinion, *U.S. v. Peterson, supra.* Therein, after re-

viewing the facts the court concluded the filing of claims was done only by James E. Peterson, the filing was not a joint act involving Dr. Peterson, and obviously Dr. Peterson was not a conspirator to the wrongful act of filing. Obviously, said the court, because of the fact that the change in address made in the applications by James Peterson was meaningful, and proved non-participation by Dr. Peterson.

The CA 5 conclusion in the instant case (*Peterson v. Weinberger, supra*) is irreconcilably inconsistent with its earlier decision though the case facts, the same claims are involved. A reading of the incomplete findings of fact in the appellate court decision in the instant case leaves one confused, for the evidentiary facts are inadequate to support its conclusion that Dr. Peterson filed false claims. The wrongful act was the filing of false claims, yet the only act of Dr. Peterson (paying money) was independent thereof and occurred weeks after the alleged wrongful act. Guilt was concluded here based solely on association, because James Peterson is the brother of Petitioner, Dr. Peterson.

The first opinion of the court of appeals was decided by one panel of judges, and a reading of it shows an astute evaluation of circumstantial facts. The second opinion, decided by a different panel, shows an ignoring of the facts and reasoning contained in the earlier decision.

At the oral hearing, before the Court of Appeals, in response to inquiries from the judges, Petitioner's counsel stated that Petitioner relied on the sound conclusions and intelligent reasoning in *U.S. v. Peterson, supra,* decided ten months ear-

lier, which involved the same facts, and these had been adjudicated. The opinion of the second panel made no mention of estoppel, made no effort to reconcile the two cases; instead, the panel adopted inconsistent results.

The six significant dates and events in the court proceedings involving these two companion cases are as follows:

1. February, 1973	First trial of false statement charge and conspiracy to defraud charge
2. June, 1973	Trial of instant case: False Claims Act[4]
3. August, 1973	Writ of mandamus sought against trial judge (instant case)
4. October, 1973	Decision in instant case by trial judge
5. January, 1974	Reversal of first case by CA 5
6. February, 1975	CA 5 decision in instant case

The facts have been stated briefly and concisely. The complete facts present a case much more favorable to Petitioner. The relentless attack of Justice has not been limited to Petitioner. A malpractice suit, politically inspired, was initiated by the Washington office of Justice against former co-counsel of Petitioner (D.K.), who withdrew from the case to serve as First Assistant Attorney to the Texas Attorney General. This was an unmeritorious suit, so much so that the Dallas attorney of Justice (KM) refused to file the suit sent to him by Washington. So the suit was filed in Austin, Texas, where the attorney now resides. D.K. first learned of the malpractice

[4] Unable to get a severance of third party defendant (James Peterson) from this case (the defendant held guilty) petitioner was forced to waive a trial by jury. With James Peterson being tried jointly before a jury, an adverse verdict against petitioner was a certainty. Consequently, the findings of fact and verdict here were those of the trial judge.

suit against him by reading the newspaper accounts. Last week in response to a motion for summary judgment, this suit was dismissed. Incidentally, Justice also used public relations and Dallas newspapers in attacking Petitioner, to abuse him and discourage him from continuing this litigation.

There is a second inconsistency in this case, involving the rule of law applied. Contrary to the rule of law adopted by the circuit in *U.S. v. Prioli* (CA 5, 1959) 272 F.2d 589, the appellate court has held Petitioner liable under the F.C.A., based on an imputed intent. Under the rule of *stare decisis*, unless and until this Court should reverse *Prioli*, the appellate court was bound to follow the established law, as announced in that case. Its failure to do so denied due process of law to Petitioner.

2. Facts — Bad faith, denial of fair trial

The situation confronting the government in October, 1971 was briefly this: a suit had been filed by Petitioner, a physician who had been abused, had been deprived of due process. Although Petitioner was only one of many physicians so deprived, clearly this particular case was a most unfortunate one for the government. There was gross abuse; it would be a difficult case to defend. An adverse decision could be a costly precedent. The government considered it (in words used by the prosecuting attorney in describing it to the jury) "a most important case."

Not having any valid defense, the government adopted legal tactics based on a vigorous attack. In view of Petitioner's limited resources, obviously it would be easy to overwhelm

him. The government had adequate means, and they found an instrument, though it was unfair and unethical. For two years the government had been sitting on a completed investigation of a Medicare operation of Petitioner's brother. Included in the investigation was some $17,000 in Medicare claims, for which incidentally services had been rendered to patients. The wrongful act was the filing of these claims, and always the government has known, and off-the-record has freely admitted, the non-involvement of Dr. Peterson in filing these claims. The wrongful act involved only the brother and his business; the filing was done completely independently of Petitioner.

Nevertheless, government legal tactics have succeeded: the smear attack did, though unfairly and falsely, attribute the claims to Petitioner, despite the facts. A decision by the trial and appellate courts on the really important issue presented herein has been avoided: Where a physician has been denied due process and abused through a conspiracy, what is the personal liability of filed investigators acting without authority, and the liability of government and the cooperating insurance companies.

With respect to its deficient suspension procedures denying due process to physicians, HEW has changed its practices, now giving written notice and a hearing before a physician is suspended. Also, in the 1972 Amendments to Medicare, Congress set up by statute procedures to protect and implement the Constitutional right, to prevent future abuses and denial of due process such as that which occurred here.

The facts reflecting bad faith of the Federal Government

in this case are not contained in the record. Some such facts have become apparent only recently, after the trial of this case. Principally involved in these facts are three government employees: (1) Dallas attorney for Justice (KM); (2) the trial judge's court reporter (CL); and (3) the HEW field investigator (CG). Incidentally involved is the trial judge and a Justice Department attorney (a high official whose identity is unknown to Petitioner's trial counsel but is known to the trial judge and to Justice).

As to the Dallas Attorney for Justice:

Shortly after Petitioner's counsel filed this case to stop HEW abuse and harrassment of Dr. Peterson, in September, 1971, Petitioner's counsel visited the Dallas office of Justice Department, seeking relief without further litigation. Counsel waited to talk with the Assistant U.S. Attorney (KM) in his secretary's adjoining office, and the door between offices was open. KM was busy talking about this case on long-distance to his superior, to a justice department lawyer in Washington. The conversation was lengthy, continuing more than 30 minutes. The views of the Dallas attorney were made quite clear; he insisted:

(1) any offensive launched by Justice against Dr. Peterson was wrong and a mistake;

(2) clearly, Dr. Peterson had done no wrong, he was not guilty, but instead was an innocent party. Bringing charges against Dr. Peterson was proceeding against the wrong party, as Dr. Peterson was not a party to the filing of claims (the alleged fraudulent scheme);

(3) the abuse of Dr. Peterson, and his character and reputation had been investigated, as well as the facts about the Medicare claims and payments, and based thereon a settlement of the litigation was strongly recommended;

(4) reluctantly, KM agreed to represent Justice in the civil proceedings, but in so doing insisted the planned course of action of Justice was in error, since action was being taken against the wrong person, an innocent party. He pled for Justice to take a different course.

This Justice attorney (KM), a year or so later, in the presence of Petitioner's counsel and another attorney, admitted the evidence produced by Petitioner before trial was sufficient to convince him that Dr. Peterson did not participate in the wrongful act (filing false claims), that he felt sorry for the innocent victim, but that the defense of Dr. Peterson was simply not his responsibility.

On another occasion the Justice attorney (KM) stated that Justice Department, despite the convincing facts to the contrary, intended to succeed in its efforts "to pin these claims onto Dr. Peterson." And he also admitted "the claims should not be attributed to Dr. Peterson."

Further, KM often communicated his desire to settle, and he approved certain settlement offers submitted, and forwarded them to Washington, recommending acceptance. But the offers were rejected by the high official of Justice in Washington. This Dallas attorney of Justice knew not of the existing inside track of communication and influence possessed by the high official, with the trial judge, nor did Petitioner's counsel at that time know of this illicit relationship.

As to the trial judge's court reporter:

Subsequent to the June, 1973, trial in this case, accompanied by a third person, counsel for Petitioner met to discuss the record in this case with the trial judge's court reporter (C.L.). Previous to the conference the reporter had been drinking alcohol, and consequently he was talking freely.

Petitioner's counsel commented that all rulings of the trial judge were consistently adverse to Petitioner, and many were clearly unfair and erroneous. Conjecture was made as to the motivation for such rulings, for example, rulings denying inspection and discovery and depriving Petitioner of right to call witness designated in pre-trial order.

First, the reporter explained the rulings were not motivated by the persuasion, friendship or personality of the Dallas government attorney (KM). He referred to KM as no more than "a little pipsqueak."

The reporter continued: instead, the trial judge talked frequently with "a top attorney in Justice in Washington," a "friend of long standing with the judge." In order "to get advice," he said, the trial judge talked to Washington on several occasions.

The trial judge had been appointed to his Federal judgeship less than two years previously. It is understood in Dallas that his appointment was greatly facilitated, if it was not the result of, participation of the Justice Department attorneys.

However, Petitioner's counsel believes the trial judge is a man of high principle, a man who cannot be bought. But the judge is also a generous man, who would be inclined to

pay a moral obligation, and gratitude could influence his action. But clearly bribery could not buy him. Here, though, we have a gratitude situation, to which this conscientious judge could be susceptible. It is believed the rulings, verdict and decisions, as made by this young, ambitious Federal judge, in this case were improperly influenced by the "top official of Justice in Washington."

As to HEW field investigator:

Petitioner's attorneys have never been permitted to inspect the government's case file, either for Dr. Peterson or for the Medicare claim investigation. Timely pretrial demands, oral and written, were properly made, as prescribed by Federal rules for discovery.

The first bad-faith response of the government was in December, 1971, when Justice purportedly offered all government files on Dr. Peterson, in response to demands made by Petitioner's attorneys. Justice has since admitted such files were incomplete.

During the trial the judge conducted a hearing on failure of pre-trial discovery.

The HEW field investigator (CG) who had custody of the case file testified. He admitted the case file as submitted for inspection immediately prior to trial was not the complete case file, as many significant documents were missing. The government did not justify its failures except the witness said many many government attorneys had used the files for the prosecution of Dr. Peterson in the four cases brought against him. Of course the trial of the instant case, the first one filed, had been

successfully delayed by the government. This, he said, may be the cause of the incompleteness of the file. In fact, the file submitted for inspection consisted only of insignificant documents, as indicated in the record.

As CG is a defendant herein and personal liability is asserted against him along with other HEW employees who had unlimited access to the case file, the incompleteness of the case file is understandable. Laxity in custody served the best interest of all defendants, including the government.

ARGUMENTS

Argument 1 — Inconsistency of Decisions

This Court has expressed its concern about departures by lower courts from accepted and usual course of judicial proceedings. Such departures, including the one here, calls for an exercise of the Court's power of supervision, Rule 19, subdivision 1(b). Likewise, the Court is interested in the quality of justice. The appellate court decision here is patently defective, apparent when it is contrasted with the earlier decision in a companion case, *U.S. v. Peterson, supra.* The instant case opinion of the lower court is incomplete, because of the absence of essential supporting facts, and is unsound as to the conclusion of fact adopted.

Petitioner seeks a remand to the court of appeals to correct this inconsistency. The mandate order should include instructions for the lower court to reverse its decision in the instant case, or else make a reconciliation of the inconsistencies between its two decisions, made by the two different panels of judges. The two cases do involve the same facts (here we have

multiple prosecution for the same act) and the conclusion of the earlier decision was that Dr. Peterson was *not* involved in the fraudulent scheme as a participant, or even as a conspirator. In its opinion here the appellate court adopted an inconsistent conclusion without reconciliation with its contrary conclusion previously adopted. A comparison of the two opinions is revealing. The evaluation of facts made in the first opinion, which facts were subsequently ignored, makes the error in the instant case conclusion a patent one.

In oral arguments before the appellate court Petitioner asked for estoppel, based on the earlier opinion of the appellate court adjudicating the Petitioner's noninvolvement in the filing of claims. Previously the same court had considered and approved the doctrine of estoppel, a case involving a third litigation, *Garden Suburbs Golf & Country Club, Inc. v. Murrell* (CA5, 1950) 180 F.2d 435. There the Fifth Circuit Court held the defendant should have pled estoppel in the second case, which defense at that time would have been a valid one. But where he failed to do so in the second case, the defendant is bound by that second adverse final judgment. In the instant case there is only one judgment that is final, the first one of *U.S. v. Peterson, supra*. It was error for the court of appeals to ignore here in the second case the Petitioner's defense based on estoppel, a defense presented at the oral hearing.

There is a second inconsistency, one of law, in the appellate court's opinion. That court adopted a rule of law in *U.S. v. Prioli* (CA 5, 1959), that under the False Claims Act intent may not be imputed to an unknowing participant. The facts here show Dr. Peterson to be an unknowing participant, his

only act involved checks which were issued as a separate act, entirely separate and occurring weeks after the wrongful act (filing of false claims). Clearly, Dr. Peterson was not involved in the wrongful act, except by implication based on subsequent independent acts.

There should be, there must be, a continuity and consistency in the law. *Helvering v. Hallock* (1940) 309 U.S. 106, 119. Particularly important is continuity under penal statutes such as the False Claims Act, for citizens have the right to know whether their acts do or do not cause huge penalties. Here the huge amount is $132,000, and the government did attempt to collect more than $480,000.

A discussion of the rules of consistency in the law are beyond the scope of this motion. Herein it is noted that the two rules have been violated. As to the rule of *res judicata* see Courts Sec. 188, 21 CJS p. 301, 21 CJS pp. 304-305 and CJS Judgments, Sec. 592, 50 CJS pp. 11-468. As to the elementary rule of law, *stare decisis,* see Courts Sec. 187, 21 CJS pp. 302-304.

Argument 2 —

Petitioner also seeks upon remand for instructions of the Court, ordering the trial judge's verdict to be set aside, on grounds Petitioner was denied a fair trial in violation of his guarantee under Constitutional Amendment V.

As shown by previously stated facts, the government here set out simply "to get Dr. Peterson" and in connection therewith did deprive him of his right to a fair trial. Further, on the part of the trial judge there was improper influence, arising from bias or prejudice, adverse to Petitioner. Such improper influ-

ence, believes Petitioner's counsel, arises from two sources. First, there is gratitude, a repayment of a moral obligation arising from political services rendered the judge. Second, there exists a trial judge hostility, arising from actions of Petitioner's counsel, a petition for disqualification as a trial judge and a petition for mandamus filed after the trial of this case but before his verdict and decision was issued.[5]

Where a defendant is denied a fair trial, due to information withheld by a government trial attorney, the verdict must be set aside. *U.S. v. Rispo* (CA3, 1972) 460 F.2d 965. There is a denial of a fair trial, and this violates the guarantee of due process of law under Amendment V of the Constitution. *Rochin v. California* 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205.

Petitioner and his counsel believe the government case file contained evidence (documents and conclusions) proving Dr. Peterson's noninvolvement with filing false claims, and precluding an adverse verdict.

The defense is entitled to examine government files, and a denial of this inspection deprives defendant of a fair trial. *Jencks v. U.S.*, 353 U.S. 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007.

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[5] These two efforts to transfer the litigation from the trial judge were proper, being responsive to the judge's expressed prejudging and his biased and unfair rulings adverse to petitioner. Under all the Texas cases on tort law the petitioner had a valid cause of action, but the trial judge advised petitioner's counsel on two occasions before trial that he simply had no intention of hearing this case in his court. The trial judge did not want to decide the tort liability issue, nor did he want to be reversed on appeal of his decision adverse to petitioner.

CONCLUSION

For the foregoing reasons, considering each of the two issues separately and both combined, it is respectfully urged that this Petition for Rehearing be granted, and that upon further consideration, a writ of mandamus issue to the United States Court of Appeals for the Fifth Circuit.

Petitioner moves the Court to remand this case to the Fifth Circuit Court of Appeals, with instructions (1) for the appellate court in banc to reconcile its decision in the instant case with its earlier decision and (2) for the verdict of the trial judge to be set aside as Petitioner was denied a fair trial, and his conclusions are not supported by proper findings of fact.

Glynn A. Pugh,
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, Glynn A. Pugh, counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court, and as hereinbefore stated.

Glynn A. Pugh,
Counsel for Petitioner